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TRANSCRIPT OF RECORD.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

NO. [redacted] 440

Philadelphia and Reading Railway Company,

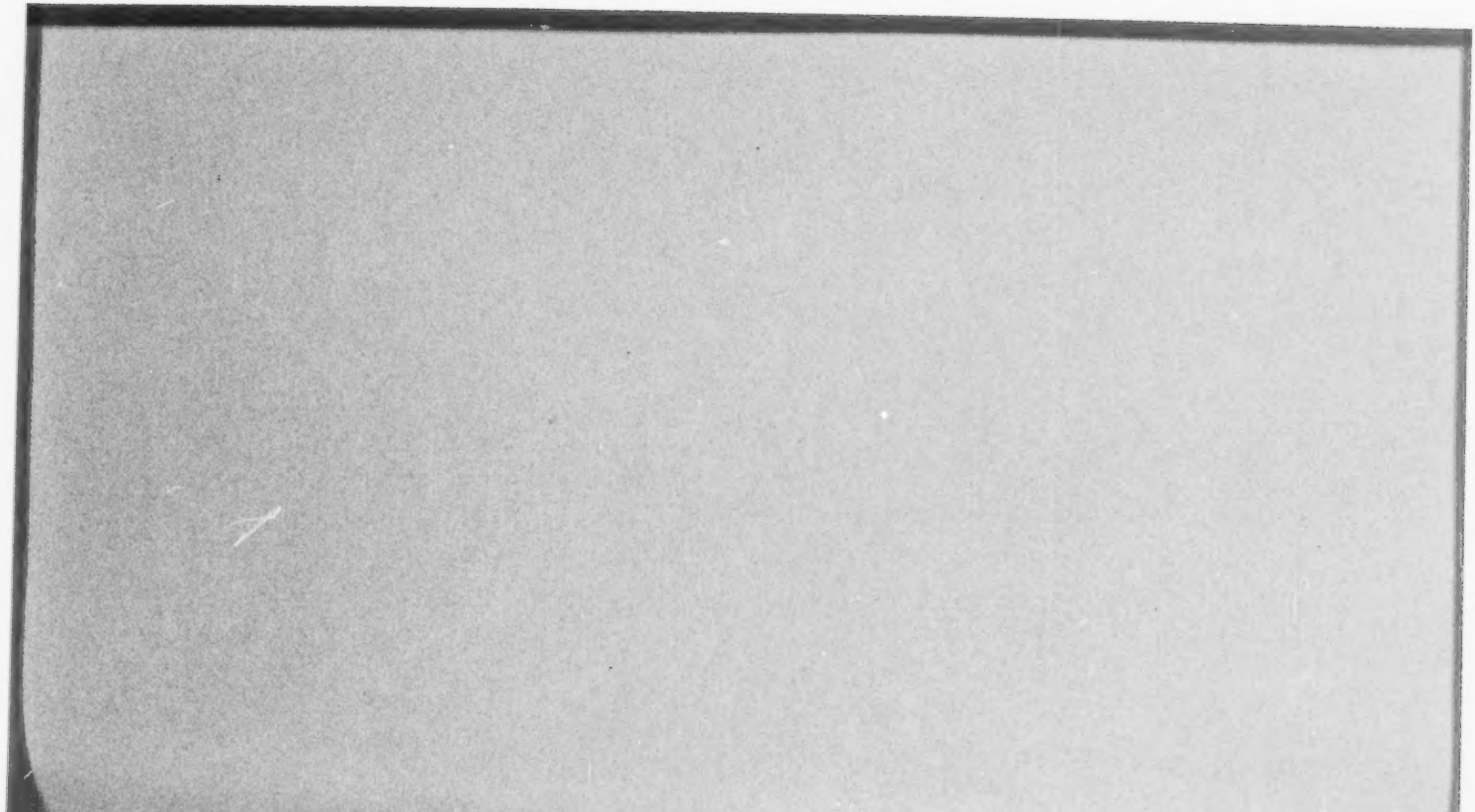
Appellant,

vs.

The United States of America; (Interstate Commerce Commission, and Allentown Portland Cement Company, Intervening Respondents,)

Appellees.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.



( )

Supreme Court of the United States.

October Term, 1914.

No.

PHILADELPHIA AND READING RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA;
(Interstate Commerce Commission, and Allentown Portland Cement Company, Intervening Respondents,)

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

DOCKET ENTRIES

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

June Session, 1914.

Wm. L. Kinter
Henry S. Drinker

Philadelphia and Reading Railway Company

vs.

United States of America.

Joseph W. Folk
Charles W. Needham
for Interstate Commerce Commission.

Wm. A. Glasgow, Jr.,
for Allentown Portland Cement Co.

Francis Fisher Kane,
U. S. Attorney.

Blackburn Esterline,
Spec. Asst. to Attorney General.

1914 August	27	Bill of Complaint filed. Subpoena returnable September 16, 1914.
September	2	Printed copy of Bill of Complaint filed with acceptance of service. Acceptance of service of subpoena filed.
	8	Order for the appearance of Joseph W. Folk and Charles W. Needham, Esquires, for defendant filed.

	16	Printed Answer filed.
	17	Order for the appearance of William A. Glasgow, Esquire, for Allentown Portland Cement Company filed.
	29	Order extending defendant's time to answer or move to dismiss the petition to and including October 15, 1914.
October	14	Answer filed.
November	9	Petition of Allentown Portland Cement Company for right to intervene filed.
		Order making Allentown Portland Cement Company party defendant filed.
		Answer of Allentown Portland Cement Company filed.
		Order setting down this case for final hearing on this date on bill and answer filed.
		Argued on bill and answer.
1915 January	16	Opinion, Woolley, C. J., dismissing Bill of Complaint filed.
February	16	Decree dismissing Bill of Complaint with costs filed.
	18	Assignments of Error filed.
		Petition for appeal to U. S. Supreme Court filed.
		Order allowing appeal to U. S. Supreme Court filed.
	19	Plaintiff's bond for costs on appeal in $500.00 with United States Fidelity & Guaranty Company as surety and order of approval filed.
		Citation allowed and issued.
April	1	Praecipe sur transcript of record sur appeal filed.
		Citation returned service accepted and filed.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

June Term, 1914. No. 1307.

IN EQUITY.

PHILADELPHIA AND READING RAILWAY COMPANY,
Complainant,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

BILL OF COMPLAINT.
Filed Aug. 27, 1914.

To the Honorable, the Judges of said Court:

Your orator, Philadelphia and Reading Railway Company, respectfuliy shows as follows:

1. That it is a corporation organized and existing under the laws of the State of Pennsylvania, and is a common carrier by railroad participating with its connections in traffic between certain points in Pennsylvania, including Evansville, and Jersey City, New Jersey.

That this Bill of Complaint is filed for the purpose of enjoining, setting aside, annulling and suspending the order entered by the Interstate Commerce Commission upon the complaint brought against your orator by the Allentown Portland Cement Company, as hereinafter set forth.

2. That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of $3,000.

3. That on or about the fifteenth day of November, 1912, the Allentown Portland Cement Company, a New Jersey corporation, filed a certain petition before the Interstate Commerce Commission against the complainant herein, together with The Central Railroad Company of New Jersey, Delaware, Lackawanna and Western Railroad Company, Erie Rail-

road Company and The Pennsylvania Railroad Company, the same being docketed on the docket of the Interstate Commerce Commission as Docket No. 5314. A copy of said petition is annexed hereto being marked "Exhibit A" and made a part hereof.

4. That by the said petition the said Allentown Portland Cement Company attacked the rate on cement participated in by your orator from Evansville, Pennsylvania, to Jersey City, New Jersey, the said rate being $1.35 per ton. The specific charge against said rate is stated in the fifth paragraph of the said petition as follows:

> "5. Complainant charges that all of the above rates, except the export rate of eighty cents (80c.) per ton to Jersey City, (which however should read for water shipments beyond instead of for export) are unjust and unreasonable and discriminate against complainant and the locality in which its plant is located, and are in violation of Section 1 and Section 3 respectively of the Act to Regulate Commerce aforesaid."

The prayer in said complaint is that the said Commission should enter an order "fixing the reasonable and just rates for the transportation of Portland cement from its factory or plant at Evansville, over the lines of the defendants to the points named above; and that the Commission will award to complainant such just and proper reparation by reason of the charge to it of the unreasonable rates aforesaid, as to the Commission may seem just and proper."

5. That to said petition your orator filed an answer before the said Interstate Commerce Commission denying that the rates complained of, or any of them, were unjust, unreasonable or discriminatory or in violation of Sections 1 and 3 of the Act to Regulate Commerce; and further denying that the petitioner therein was entitled to any reparation by reason of the payment by it of any of the aforesaid rates.

6. That, in pursuance of said petition and answer, a hearing was held before the Interstate Commerce Commission on April 7, 1913, at which testimony was taken on behalf of the said Allentown Portland Cement Company, and on behalf of Philadelphia and Reading Railway Company, your orator herein.

7. That from said testimony it appeared that the cement plant of the Allentown Portland Cement Company is located at Evansville, Pa., and is served exclusively by the Philadelphia and Reading Railway; also that there are a number of cement plants within a radius of approximately twenty miles from Evansville, which are served by the Central Railroad of New Jersey or Lehigh Valley Railroad either directly or in conjunction with the Ironton Railroad, Northampton and Bath Railroad, or Lehigh and New England Railroad and are not reached by the Philadelphia and Reading Railway. It further appeared that from these plants, which are not reached by the Philadelphia and Reading Railway, certain rates on cement were published to places in New York, New England, New Jersey, Pennsylvania, Maryland, &c., some of which (Philadelphia, Baltimore and Washington, for example) applied in connection with the Philadelphia and Reading Railway, and that the Philadelphia and Reading Railway Company has established from Evansville to many points the same rates as were effective from the aforesaid contiguous cement plants not served by it, but to various points the rates from Evansville were either lower or higher than the rates established by competing carriers from the cement plants contiguous to Evansville. It particularly appeared that from the cement plants contiguous to Evansville there had been established certain subnormal rates to Jersey City and vicinity, the rate to Jersey City proper being eighty cents per two thousand pounds; that these subnormal rates were not participated in by the Philadelphia and Reading Railway, nor met by it in the establishment of a rate to Jersey City from Evansville, excepting that the Philadelphia and Reading Railway did issue by one route a rate of eighty cents per two thousand pounds to Jersey City on shipments destined beyond via water—in other words virtually a proportional rate on shipments going to cost ports; and that the minimum rate issued by the Philadelphia and Reading Railway from Evansville to Jersey City and vicinity was $1.35 per two thousand pounds.

Briefly summarized, the sole position of complainants before the Interstate Commerce Commission in the testimony therein taken, was that inasmuch as the Philadelphia and Reading Railway Company issued from Evansville to many places of destination the same rates on cement as were made by competing carriers serving the cement plants contiguous

to Evansville, your orator should, as to Jersey City and vicinity, meet from Evansville the subnormal rates established by other carriers from contiguous plants. There was no evidence presented tending to show that the rate of $1.35 per two thousand pounds, issued by the Philadelphia and Reading Railway, from Evansville to Jersey City and vicinity was inherently unreasonable, and consequently no finding by the Commission in its report hereinafter referred to in reference to same.

8. In pursuance of the said hearing so held and the testimony so taken, the Interstate Commerce Commission on June 18th, 1913, rendered its decision, a copy of which is hereto annexed, marked "Exhibit B", and made a part of this bill. In its said decision, the Commission held as follows:

> "We are therefore of opinion, and find, that in maintaining or participating in rates on cement in carloads to other destinations, such as Baltimore, Philadelphia, New York and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia and Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist."

In pursuance of said opinion, the said Commission issued an order which is annexed to said opinion (being said "Exhibit B" hereto annexed) requiring, *inter alia*:

> "That the above-named defendants, according as their various lines or routes may run, be, and they are hereby notified and required, on or before September 15th, 1913, to cease and desist from said undue and unreasonable prejudices and disadvantages."

9. On or about July 18th, 1913, your orator, the Philadelphia and Reading Railway Company, filed a petition for a rehearing of the foregoing proceeding and, in pursuance thereof, a rehearing of the said proceeding was held before the said Interstate Commerce Commission on December 2d, 1913, and additional testimony therein taken. The principal ground

for the reversal of the order of said Commission relied upon by your orator in connection with said petition for rehearing was that the order of the Commission so entered was not sustained by and was in violation of the provisions of the Interstate Commerce Act on which it was based.

10. In pursuance of said petition for rehearing and of the rehearing held thereon, the Interstate Commerce Commission on July 10th, 1914, rendered an opinion in which the original findings and order heretofore referred to were affirmed and the same order entered, to be effective October 1st, 1914. The grounds on which the opinion of the said Commission was affirmed were substantially the same as those on which the previous opinion was based, the said opinion and the order based thereon being hereto annexed marked "Exhibit C", and made a part hereof.

In neither the original finding, report or opinion, of the Commission nor in the supplemental findings, report or opinion was there any finding by the Commission either (1) that the $1.35 rate participated in by the Philadelphia and Reading Railway Company to Jersey City was unjust or unreasonable of itself, or (2) that the said $1.35 rate was unjust or unreasonable in comparison with any other rate to any other point established or participated in by the Philadelphia and Reading Railway Company.

11. In pursuance of the order so entered, the Philadelphia and Reading Railway Company will be obliged to file on or before September 1st, 1914, its tariff putting rates into effect conformably with said order, unless this Court shall grant an injunction restraining the enforcement of said order of the Commission.

12. That the Philadelphia and Reading Railway Company, complainant herein, is advised by counsel and therefore avers that, where a carrier publishes rates from a point on its line to general destinations, which rates are the same as those published by competing carriers from contiguous points, and does not publish to specific destinations certain sub-normal rates made by competing carriers from the same contiguous points, but instead publishes rates that are not of themselves unreasonable it cannot, under a proper construction of the Act to Regulate Commerce be held that the carrier so refusing to

publish such sub-normal rates is subjecting "any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage." The construction of the Interstate Commerce Act which, as your orator is advised by counsel and therefore avers, has erroneously been adopted by the Interstate Commerce Commission, would place the rates of any carrier at the mercy of its competitors, so far as they may apply on any commodity which originates at contiguous points served by competing carriers, since the establishment of the same rates to certain points, which rates are deemed profitable, as those that may be made by competing carriers from contiguous industries, would make it necessary, without regard to the revenue involved and irrespective of business expediency, to establish to all destinations the same rates as those which may be made by competing carriers.

13. By reason of the premises, the order of the Interstate Commerce Commission so entered will, unless restrained by your Honorable Court, produce irreparable damage to your complainant, not only from its effect on the particular rates here in question, but in establishing a principle which, if generally applied, would disarrange and destroy the system of rates established by your orator to various points on its line.

14. The said unlawful order by the Commission made and promulgated by it as aforesaid in the assumed exercise of authority unlawfully claimed by the Commission under said Act will, unless the same be enjoined and set aside, annulled and suspended by this Honorable Court, subject your orators to a multiplicity of suits for heavy penalties and a multiplicity of suits for the enforcement of the said order under the provisions of said Act.

15. Your orator further shows that if it shall comply with the said unlawful order even temporarily, pending final adjudication herein of the lawfulness of the same, your orator will be without any means of reparation for the losses in revenue thereby sustained.

In consideration whereof, for as much as your orator is remediless in the premises at and by the strict rule of the common law and is only relievable in a court of equity, where matters of this kind are properly cognizable and reviewable

under the Act to Regulate Commerce hereinbefore mentioned and the Acts amendatory thereof or supplementary thereto, your orator prays that a preliminary or interlocutory order or injunction may be entered suspending the order of the said Interstate Commerce Commission and restraining the said Interstate Commerce Commission from taking any steps or instituting any proceedings to enforce said order until the final determination of this cause, and that upon the final hearing of this cause a decree be entered herein, enjoining, setting aside, annulling and suspending the said order of the Interstate Commerce Commission and perpetually enjoining the enforcement of said order.

Your orator further prays that such other and further relief be granted in the premises as justice and equity may require.

Your orator further prays that Your Honors may grant unto your orator a writ of subpoena directed to the United States of America, commanding it at a certain day and under a certain penalty therein to be specified personally to be and appear before this Honorable Court, and then and there full, true and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived), and to stand to and abide such order and decree herein as to your Honors shall seem meet and agreeable to equity and good conscience.

And your orator will ever pray, &c.

WM. L. KINTER,
H. S. DRINKER, JR.,
Solicitors and Counsel for Philadelphia and Reading Railway Company.

Office and postoffice addresses:

William L. Kinter, Reading Terminal, Philadelphia, Penna.

Henry S. Drinker, Jr., Bullitt Building, Philadelphia, Penna.

COMMONWEALTH OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

Before me, the subscriber, a Notary Public in and for the Commonwealth of Pennsylvania, residing in the City and County of Philadelphia, personally appeared the undersigned, John F. Auch who, having been by me duly sworn according to law, deposes and says that he is Vice-President and Traffic Manager of Philadelphia and Reading Railway Company, the above named complainant; that he has read the said complaint and that the same is true of his own knowledge, except such matters as are therein stated on information and belief, and that as to such statements he believes it to be true.

J. F. AUCH.

Sworn to and subscribed before me this 26th day of August A. D. 1914.

WILLIAM M. KITZMILLER,
(Seal) *Notary Public.*
Commission expires Jan. 7th, 1917.

EXHIBIT A.

Before the Interstate Commerce Commission.

The Allentown Portland Cement Company
vs.
Philadelphia & Reading Railway Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The Pennsylvania Railroad Company.

The petition of the Allentown Portland Cement Company above named respectfully shows:

1. That it is a corporation organized under the laws of the State of New Jersey, having its registered office at Numbers 427 and 429 Market Street, in the City of Camden, New Jersey, and its principal office at Room 404, Allentown National Bank Building, in the city of Allentown, Pennsylvania,

and is the owner of and operates a Portland Cement manufacturing plant located at or near Evansville Station, Berks County, Pennsylvania, along the line of the Schuylkill & Lehigh Branch of the Philadelphia & Reading Railway, one of the defendants above named.

2. That the defendants above named are common carriers engaged in the transportation of passengers and property, by continuous carriage or shipment, partly by rail and partly by water, between points in the State of Pennsylvania and points in the State of New Jersey, and other States, and, as such common carriers, are subject to the provisions of the Act to Regulate Commerce, approved February 4th, 1887, and Acts amendatory thereof or supplementary thereto.

3. The defendants, the Philadelphia & Reading Railway Company, controls and operates the only line of railroad to and from the works or plant of the complainant, and, in connection with the other defendants, makes deliveries of Portland Cement, manufactured by complainant, to Jersey City proper and to Jersey City for points beyond, including the city of New York and other delivery points hereinafter named and located within the so-called "Metropolitan District".

4. The said Philadelphia & Reading Railway Company, as will appear by reference to its published tariffs used in interstate commerce, publishes, charges and collects rates for hauling Portland Cement from the works of the complainant at Evansville Station, in connection with the other defendants, to Jersey City and other points in the Metropolitan District, as follows:

Destination.	Via P. & R. Ry. In connection with	Rate per ton.
Jersey City (proper)	C. R. R. of N. J.	$1.40
" " "	Erie R. R.	1.35
" " "	Lehigh Valley R. R.	1.35
" " "	Pennsylvania R. R.	1.50
Newark, N. J.	C. R. R. of N. J.	1.40
" "	Lehigh Valley R. R.	1.35
" "	D. L. & W. R. R.	1.35
" "	Erie R. R.	1.35
" "	Pennsylvania R. R.	1.50
Elizabeth, N. J.	C. R. R. of N. J.	1.40
" "	Pennsylvania R. R.	1.50
Perth Amboy, N. J.	C. R. R. of N. J.	1.40

" " "	Lehigh Valley R. R.....	1.40
" " "	Pennsylvania R. R.....	1.50
Bayonne, N. J.....	C. R. R. of N. J.....	1.40
" "	Lehigh Valley R. R.....	1.35
" "	Pennsylvania R. R.....	1.50
Hoboken, N. J.....	D. L. & W. R. R.....	1.35
" "	Pennsylvania R. R.....	2.00
Weehawken, N. J.....	Erie R. R.	1.35

5. Complainant charges that all of the above rates, except the export rate, of eighty cents (80 cents) per ton to Jersey City (which, however, should read for water shipments beyond instead of for export), are unjust and unreasonable and discriminate against complainant and the locality in which its plant is located, and are in violation of Section 1 and Section 3 respectively of the Act to Regulate Commerce, aforesaid.

Wherefore, complainant prays that this Commission will enter an order declaring the rates aforesaid to be unjust and unreasonable and that the same discriminate against complainant and the locality wherein is located its plant or factory aforesaid, and that the Commission will also enter an order fixing the reasonable and just rates for the transportation of Portland Cement from its factory or plant at Evansville, over the lines of the defendants to the points named above; and that the Commission will award to complainant such just and proper reparation by reason of the charge to it of the unreasonable rates aforesaid, as to the Commission may seem just and proper.

And complainant will ever pray, etc.

THE ALLENTOWN PORTLAND CEMENT COMPANY,
By R. S. WEAVER,
Secretary.

WM. A. GLASGOW, JR.,
CHESTER N. FARR, JR.,
1018 Real Estate Trust Building,
Philadelphia, Pa.,

GEORGE W. AUBREY,
Allentown, Pa.,
Counsel for Plaintiff.

EXHIBIT B.

Opinion No. 2365.

INTERSTATE COMMERCE COMMISSION.

No. 5314.
Allentown Portland Cement Company
vs.
Philadelphia & Reading Railway Company, et al.

No. 5314.
Allentown Portland Cement Company
vs.
Philadelphia & Reading Railway Company, et al.

Submitted May 7, 1913. Decided June 18, 1913.

Defendants' rates on cement in carloads to Baltimore, Philadelphia, New York City, points in New England, and to Jersey City for beyond to the southeast are the same from Evansville, Pa., in the so-called Lehigh district, as from the other cement-producing points in that district. On cement to Jersey City locally their rates are much higher from Evansville than from these other mills. Such relative adjustment on the latter traffic held to subject the city of Jersey City and its traffic to undue prejudice and disadvantage.

William A. Glasgow, Jr., Chester N. Farr, Jr., and George W. Aubrey, for complainant.

William L. Kinter for Philadelphia & Reading Railway Company.

REPORT OF THE COMMISSION.

CLEMENTS, *Commissioner.*

This complaint involves the reasonableness of rates on cement in carloads from Evansville, Pa., to Jersey City and contiguous New Jersey points within the so-called Metropolitan district. Evansville is 10 miles north of Reading, Pa., on the Philadelphia & Reading Railway, which is the only carrier reaching that point. The specific destinations in issue and the delivering carriers are as follows:

Jersey City: Central Railroad of New Jersey; Erie; Lehigh Valley; Pennsylvania. Newark: Central Railroad of New Jersey; Erie; Lehigh Valley; Pennsylvania; Delaware, Lackawanna & Western. Elizabeth: Central Railroad of New Jersey; Pennsylvania. Perth Amboy: Central Railroad of New Jersey; Lehigh Valley; Pennsylvania. Bayonne: Central Railroad of New Jersey; Lehigh Valley; Pennsylvania. Hoboken: Delaware, Lackawanna & Western. Weehawken: Erie.

The various routes are: Philadelphia & Reading to Allentown and Central Railroad of New Jersey or Lehigh Valley; Philadelphia & Reading to Allentown, Central Railroad of New Jersey to Phillipsburg, and Delaware, Lackawanna & Western; Philadelphia & Reading to Allentown, Central Railroad of New Jersey to Easton, Lehigh & New England to Greycourt, and Erie; and Philadelphia & Reading to Philadelphia and Pennsylvania.

Jersey City is the terminal point of these destinations and will be taken as representative for the purposes of this report. The distances to Jersey City via these various routes vary from 136 to 194 miles, and the rate in issue is $1.35 per ton, except that via the route in connection with the Pennsylvania from Philadelphia it is $1.50 per ton.

Evansville is situated in the Lehigh district and is one of numerous cement mills in that district located within a radius of perhaps 20 miles of each other. None of the other mills, however, are reached by the Philadelphia & Reading, they being served by the Central Railroad of New Jersey or Lehigh Valley direct or by short lines of railway which connect with those carriers at distances of from 1 to 16 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading the rate to Jersey City from these competing mills on other lines is 80 cents. Among these latter mills are those located at Nazareth and Bath, on the Lehigh & New England Railroad; at Atlas, on the Northampton & Bath Railroad; at Ormrod, on the Ironton Railroad; at Northampton, on the Central Railroad of New Jersey; and at Copley, on the Lehigh Valley Railroad. On shipments to Jersey City for transshipment by water to points in the southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills; and this equality of Evansville with

the other mills is maintained on traffic to Philadelphia, Baltimore, New York City, and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

The 80-cent rate to Jersey City locally from the other mills is used in connection with shipments destined to New York, that rate plus the trucking charge to all points south of Ninetieth street totaling less than the $1.40 rate to New York proper plus the trucking charge to the same point, the result being that complainant, who must use the latter rate, is effectively barred from competition in that part of the city located south of Forty-third street, which is the greatest cement-consuming district. North of Ninetieth street complainant can compete with the other mills because of their greater expense in the longer truck haul from Jersey City. It will also necessarily be apparent that complainant can not sell any cement in Jersey City for local consumption in competition with these other mills which have the 80-cent rate.

The defense of the case is assumed by the Philadelphia & Reading. Its witness states that the 80-cent rate on shipments destined to the southeast was established from Evansville to meet the competition of the coastwise steamship lines and of the other mills in the Lehigh district, and contends that the local rate of $1.35 in issue is itself below normal, owing in part to competition via the Hudson River from mills located on that river in the upper part of New York state, and that that rate is exceeded at intermediate points by rates as high as $1.75. It is further contended that the 80-cent rate to Jersey City proper from the other mills is abnormally low and is exceeded at intermediate points by rates of from $1.10 to $1.20. All of these intermediate rates are said to be covered by applications for relief from the operation of the fourth section of the act, on file with the Commission. Other comparisons of rates to points in New Jersey, Delaware, Pennsylvania and other states are submitted in support of the contention that the rate complained of is not unreasonable in itself.

Briefly stated, the position of the Philadelphia & Reading is that in meeting the 80-cent rate of the other mills to the southeast and in partially meeting that rate to Jersey City, as is contended it has, that company has gone as far as it consistently can in placing Evansville on a competitive basis with

the other mills in the Lehigh district; that its rate to Jersey City locally is reasonable in itself; and that, as the Philadelphia & Reading does not reach any of the other points from which the 80-cent rate is applicable and has no concern in that rate and no voice in its making, it can not be lawfully chargeable with an undue discrimination against complainant at Evansville in favor of its competitors at those points.

It can not be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the establishment of the 80-cent rate from these other mills, as it can not participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of opinion, and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 18th day of June, A. D. 1913.

No. 5314.

Allentown Portland Cement Company
vs.
The Philadelphia & Reading Railway Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; and The Pennsylvania Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and the Commission having found in said report that in maintaining to Baltimore, Md., New York, N. Y., points in New England, and various other eastern destinations, including Jersey City, N. J., on traffic for beyond to the southeast, rates on cement in carloads which are not higher from Evansville, in the so-called Lehigh district, in Pennsylvania, than their rates contemporaneously charged on similar traffic from Nazareth, Bath, Atlas, Ormond, Northampton, and Copley, also in the said district, while refusing to establish and maintain the same relative adjustment of rates as between Evansville and said other mills on cement shipped to Jersey City, N. J., for local consumption, defendants are subjecting the city of Jersey City, N. J., and its traffic to undue and unreasonable prejudices and disadvantages.

It is ordered, That the above-named defendants, according as their various lines or routes may run, be, and they are hereby, notified and required, on or before September 15, 1913, to cease and desist from said undue and unreasonable prejudices and disadvantages.

It is further ordered, That said defendants, according as their various lines or routes may run, be, and they are hereby notified and required to establish, on or before September 15,

1913, upon statutory notice to the Interstate Commerce Commission and the general public by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and for a period of two years after said September 15, 1913, to maintain and apply to said transportation rates which will prevent and avoid the aforesaid undue and unreasonable prejudices and disadvantages.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(Seal)

EXHIBIT C.

INTERSTATE COMMERCE COMMISSION.

No. 5314.

Allentown Portland Cement Company
vs.
Philadelphia & Reading Railway Company, et al.

Submitted February 16, 1914. Decided July 10, 1914.

Finding in original report that defendants in maintaining or participating in rates on cement in carloads to eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville than the rates which they contemporaneously maintain or participate in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, thereby subject Jersey City and its traffic to undue prejudice and disadvantage, affirmed.

Wm. A. Glasgow, Jr., Chester N. Farr, Jr., and *George W. Aubrey* for complainant.

Wm. L. Kinter for Philadelphia & Reading Railway Company.

Henry Wolf Bikle for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION ON REHEARING.

CLEMENTS, *Commissioner*:

This case is before us for decision upon rehearing granted upon application filed on behalf of defendants by the Philadelphia & Reading Railway Company, which carrier has from the beginning assumed the burden of defense. The case involves the question of the reasonableness and justness of defendants' rate for the transportation of cement in carloads from Evansville, Pa., to Jersey City, N. J. Evansville is reached only by the Philadelphia & Reading Railway. That carrier transports the cement in question from Evansville to Allentown, where it delivers it to one of numerous connections which either transports it to Jersey City or in turn delivers it to other carriers for final delivery at Jersey City. The rate via these various routes is $1.35. Certain of the carriers which receive this Evansville cement from the Philadelphia & Reading at Allentown also serve other mills in the same general vicinity at Allentown, namely, the Lehigh district, either directly or through connections. The rate from these other mills to Jersey City is 80 cents. The Philadelphia & Reading does not participate in the 80-cent rate from any mill in the district. The general situation with respect to the location of these various cement-producing points, the rates applicable therefrom to Jersey City, and our findings in the case are thus stated in the original report, 27 I. C. C., 448, 449:

> "Evansville is situated in the Lehigh district and is one of numerous cement mills in that district located within a radius of perhaps 20 miles of each other. None of the other mills, however, are reached by the Philadelphia & Reading, they being served by the Central Railroad of New Jersey or Lehigh Valley direct or by short lines of railway which connect with those carriers at distances of from 1 to 15 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading the rate to Jersey City from these competing mills on other lines is 80 cents. Among these latter mills are those located at Nazareth and Bath, on the Lehigh & New England Railroad; at Atlas, on the Northampton & Bath Railroad; at Ormond, on the Ironton Railroad; at Northampton, on the Central Railroad of New Jer-

sey; and at Copley, on the Lehigh Valley Railroad. On shipments to Jersey City for transshipment by water to points in the southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills; and this equality of Evansville with other mills is maintained on traffic to Philadelphia, Baltimore, New York City, and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

* * * * * * * * *

"It can not be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the establishment of the 80-cent rate from these other mills, as it can not participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of opinion and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist."

At the rehearing it was testified on behalf of defendant Philadelphia & Reading Railway that the $1.35 rate to Jersey City is applicable not only from Evansville, but also from Chapman, Pa., which with Evansville is situated only on the line of the Philadelphia & Reading. This fact was developed at the original hearing; but it was also developed at that hearing that the owners of the Chapman mill also own mills at stations in the Lehigh district on other lines from which the rate to Jersey City is 80 cents. The owners of the Chapman mill therefore do not experience the handicap in selling cement at Jersey City that complainant does, because they can supply the Jersey City demand from some of their other mills from which the rate is 80 cents.

It was further testified on behalf of the Philadelphia & Reading that there are numerous points in the east other than Jersey City to which the rate is not the same from Evansville as from the mills in the Lehigh district on other lines, as shown by a long list of points of destination contained in an exhibit filed as a part of the record. These points are principally stations of small population, with the exception of a few like Newark, Perth Amboy, Elizabeth and Weehawken, all in New Jersey, which latter as a matter of fact are covered by our findings in the original report. In that report we stated that the specific destinations in issue were Jersey City, Newark, Elizabeth, Perth Amboy, Bayonne, Hoboken, and Weehawken, and that "Jersey City is the terminal point of these destinations and will be taken as representative for the purposes of this report." While in the order we specifically deal only with the rate to Jersey City, the order by its terms makes the report a part thereof. Therefore, with the exception of the points covered by our findings, the fact remains that, as we stated in the report, the "Philadelphia & Reading is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City", and, we may add, the other points in the metropolitan district shown therein which, Jersey City having been taken as representative, it was not necessary for us again to name. Our findings were specifically based upon the relation of the rates from Evansville and mills on other lines in the Lehigh district to eastern consuming points of

equal importance with Jersey City, such as Baltimore, Philadelphia, New York, and points in New England.

It was also testified on behalf of the Philadelphia & Reading that the 80-cent rate to Jersey City applicable from other mills in the Lehigh district than Evansville, via other lines, is unreasonably low and that this is shown by the fact that rates to intermediate points are considerably higher, the intermediate rates being covered by applications for relief from the operation of the fourth section, filed by the carriers with the Commission.

Counsel for the Philadelphia & Reading also questions the soundness of our findings as a matter of law and policy, contending in oral argument that the effect thereof would be "that if a carrier chose to meet the rates of competing carriers from contiguous points of origin in cases where such competing rates were on a fair normal basis, it would have to meet every rate made by its competitors without regard to the revenue involved or business expediency."

We do not apprehend that such embarrassment to defendants as that suggested by counsel would result from our findings in this case. Each case before us must necessarily stand upon its own facts. We are dealing now only with the situation here presented.

We have carefully considered the foregoing and other contentions made upon the rehearing on behalf of defendants, and considering all the facts, circumstances, and conditions appearing we are not convinced that our original findings and conclusions in the case should be reversed. The original order entered in the case was by us vacated and set aside at the time the petition for rehearing was granted. In view of our affirmance herein of the original findings the order will again be entered.

SUPPLEMENTAL ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of July, A. D. 1914.

No. 5314.

Allentown Portland Cement Company

vs.

The Philadelphia & Reading Railway Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; and The Pennsylvania Railroad Company.

This case coming on for rehearing upon petition of the principal defendant, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed an additional report containing its findings of fact and conclusions thereon, which said report, together with the original report, is hereby referred to and made a part hereof; and the Commission having found in said reports that in maintaining to Baltimore, Md., New York, N. Y., points in New England, and various other eastern destinations, including Jersey City, N. J., on traffic for beyond to the southeast, rates on cement in carloads which are not higher from Evansville, in the so-called Lehigh district, in Pennsylvania, than their rates contemporaneously charged on similar traffic from Nazareth, Bath, Atlas,Ormond, Northampton, and Copley, also in the said district, while refusing to establish and maintain the same relative adjustment of rates as between Evansville and said other mills on cement shipped to Jersey City, N. J., for local consumption, defendants are subjecting the city of Jersey City, N. J., and its traffic to undue and unreasonable prejudices and disadvantages:

It is ordered, That the above-named defendants, according as their various lines or routes may run, be, and they are hereby, notified and required, on or before October 1, 1914, to cease and desist from said undue and unreasonable prejudices and disadvantages.

It is further ordered, That said defendants, according as their various lines or routes may run, be, and they are hereby notified and required to establish on or before October 1, 1914, upon statutory notice to the Interstate Commerce Commission and to the general public by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and for a period of two years after said October 1, 1914, to maintain and apply to said transportation rates which will prevent and avoid the aforesaid undue and unreasonable prejudices and disadvantages.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(Seal)

ANSWER OF THE UNITED STATES.

Filed Oct. 14, 1914.

United States of America, to the petition in this case filed, makes answer and says:

I, II, III, IV, V and VI. It admits the allegations contained in Paragraphs I, II, III, IV, V and VI of the petition, except as the same may be hereinafter modified.

VII, VIII, IX and X. It neither admits nor denies the allegations contained in Paragraphs VII, VIII, IX and X, in manner and form as alleged, and if the same become material upon the hearing in manner and form as alleged, it will require strict proof thereof.

It alleges that the matters and things alleged in said paragraphs, and in each of them, and sought to be put in issue, were all before the Interstate Commerce Commission, and were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the Act to Regulate Commerce. In its report in writing with respect thereto, made after a full hearing and on due notice to all of the parties, which states its conclusion, together with its decision, order, or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact, based on substantial evidence adduced by the issues made by the parties.

XII, XIII, XIV and XV. It denies that the said order of the Commission is null and void in manner and form as alleged in Paragraphs XII, XIII, XIV and XV of the petition, or for the reasons given, or any of them. On the contrary, respondent alleges that the said order was and is within the lawful power of the Commission to enter, and that the said order is now in full force and effect without any of the injury complained of on the part of the petitioner.

Further answering the said petition, and each and every part of the same, in so far as it has not heretofore been admitted, denied, or otherwise traversed, respondent denies:

(a) Any fact or facts alleged in said petition, or any part of the same, which deny, or which seek to deny, any fact or facts found by the Interstate Commerce Commission in its said report and order.

(b) Any fact or facts alleged in said petition, or any part of the same, which are inconsistent with any fact or facts found by the Interstate Commerce Commission in its said report and order.

(c) Any and all inferences of fact from any particular fact or facts alleged in the said petition, or any part of the same, which seek to deny, or which are inconsistent with, any fact or facts found by the Interstate Commerce Commission in its said report and order.

(d) Any fact or facts alleged in said petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the Interstate Commerce Commission.

(e) Any fact or facts alleged in said petition, or any part of the same, which attack or which seek to attack the report and order of the Interstate Commerce Commission, and to show facts contrary to what the said report and order show on the face thereof.

(f) Any allegations in said petition, or any part of the same, which allege that facts were found by the Interstate Commerce Commission in its said report and order which, as shown on the face thereof, in fact were not so found.

(g) Any conclusions of law alleged and insisted upon in the said petition, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission in its said report and order.

Respondent gives notice that upon the final hearing hereof, or upon any preliminary hearing hereof, and in accordance with section 1 of the act entitled "An act to create a Commerce Court", etc., approved June 18, 1910, it will move to dismiss the petition, for that the same is insufficient to state any cause of action.

Wherefore, having fully answered, respondent prays that the petition be dismissed at the cost of the petitioner, and for such other and further order as may be appropriate in the premises.

FRANCIS FISHER KANE,
United States Attorney.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

ANSWER OF THE INTERSTATE COMMERCE COMMISSION.

Filed Sept. 16, 1914.

I.

The Interstate Commerce Commission, having entered its appearance in the above-entitled cause, now, and at all times, saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the bill of complaint herein contained, for answer thereunto, or to so much or such parts thereof as this respondent is advised is material for it to make answer unto, answering says:

II.

This defendant admits the allegations in the first, second, third, fourth, fifth and sixth paragraphs of the bill of complaint herein, except as said allegations, or any of them, are modified, affected, or changed by express allegations hereinafter made by this defendant in this answer.

III.

This defendant admits the allegations contained in the seventh paragraph of said bill of complaint, excepting that—

This defendant denies that the evidence before this Commission in said cause showed that there were any "subnormal rates" from Evansville, Pa., to Jersey City, N. J., and vicinity. On the contrary, it will appear by an examination of the record in said cause that the rate of 80 cents per ton upon cement, in carloads, from Evansville to Jersey City "for points beyond" was a long-established and normal rate; that said rate was not a proportional of any joint rate, but a relative rate upon traffic going beyond Jersey City; that said rate of $1.35 per ton was charged by said complainant upon all cement in carloads originating at Evansville and transported to Jersey City and vicinity for local consumption; that as to all other important consuming points, such as Baltimore, Philadelphia, New York, Boston and other New England points, the complainant company gave the same rates respectively on cement from Evansville that other carriers gave to other mills in the Lehigh district to said points; that Evansville is in the Lehigh district, and that as all other consuming points could buy cement of any mill in said Lehigh district and have the same rates over the complainant's line from Evansville that were charged over other lines from other mills, and such relation of rates were refused to Jersey City by the complainant, this defendant duly found, after full hearing, that Jersey City and its traffic was subjected, by the complainant, to undue prejudice and disadvantage in violation of the act to regulate commerce.

That by the act to regulate commerce as amended this defendant is, among other things, charged with the duty of enforcing the said act and preventing violations thereof. That it may proceed upon complaints before it, or upon its own initiative; and whenever in any investigation it appears that a carrier is, or that carriers are, violating any of the provisions of the said act, this defendant may enter an appropriate order directing such carrier or carriers to cease and desist from such violations of the act.

This defendant denies that in conducting an investigation regarding the conduct of any carrier or carriers subject to the act, or in reaching its conclusions therein, or in making any order, this defendant is limited in any degree whatsoever by

the allegations or prayers of any complainant before it, but that under its general powers set forth in said act to regulate commerce as amended, and in the performance of the duties imposed upon it by said act, this defendant has the power, and is in duty bound, after a full hearing and investigation, to prohibit any violation of said act to regulate commerce, by any carrier subject to the act, disclosed by such investigation.

IV.

This defendant admits the allegations in the eighth, ninth, tenth and eleventh paragraphs of said bill of complaint, except as said allegations, or any of them, are modified, affected or changed by express allegations hereinafter set forth in this answer.

V.

Answering paragraph 12 of said bill of complaint, this defendant denies the conclusions of law stated therein as applied to the facts found by this defendant in its said reports—Exhibits A and B to this answer—and this defendant alleges that the order in controversy only requires the complainant to cease and desist from establishing and maintaining a relative adjustment of rates, to which it is a party upon cement in carloads between Evansville, Pa., and Jersey City, N. J., which creates the undue and unreasonable prejudices and disadvantages set forth in said reports.

VI.

Answering paragraph 13, this defendant denies that said order will produce irreparable damage to the complainant, or that it establishes a principle of law which, if generally applied, would *unlawfully*, affect the system of rates established by the complainant to various points on its line. On the contrary, said order only requires said complainant to cease and desist from a violation of the law, in the particulars set forth in said reports and order, and requires the establishment and maintenance of such relative rates upon the traffic and between points named, as will be just and reasonable and prevent the said undue and unreasonable prejudices and disadvantages.

VII.

Answering paragraph 14, this defendant denies that in the making of said order it has assumed to exercise authority unlawfully. It admits that a failure to comply with said order will subject the said complainant to penalties under said act to regulate commerce.

VIII.

Answering paragraph 15, and further answering the several allegations and contentions in said bill of complaint, this defendant alleges that all the matters, things and controversies set forth in said bill of complaint, and all the facts, circumstances, and conditions affecting and bearing upon the questions at issue in said cause before this defendant in which the order in controversy was entered, were presented to and were duly considered by this defendant in said proceeding before it; that in making its said reports and order the only matter determined by this defendant in said proceeding regarding the transportation of cement was the undue and unreasonable discrimination against Jersey City and vicinity, as consuming territory; that, as this defendant is advised, its conclusions of fact in all said matters, and particularly upon the question whether the admitted discrimination was undue and unreasonable and therefore unlawful, are final and conclusive, and the complainant is in duty bound to obey the said order.

That, as this defendant is advised, its conclusions upon the question of undue discrimination set forth in its said reports and its order thereon, can only be reviewed by this honorable court for the purpose of determining (1) whether this defendant had jurisdiction of the matter in controversy, (2) whether defendant proceeded in said hearing before it in accordance with the provisions of the act to regulate commerce as amended, (3) whether there was substantial evidence upon which to base the order, and (4) whether the order in question violates any constitutional rights of the complainant. Upon these issues this defendant alleges that it had jurisdiction of the matters in controversy; that it proceeded in said investigation and hearing in accordance with the provisions and requirements of said act; that there was substantial evidence to support its findings and order; that the bill of complaint herein does not set forth any matters of fact tending to show that the said order violates any right guaranteed by the Con-

stitution of the United States; that said order does not deprive the complainant of its property without due process of law, or take its property without just compensation; and this respondent denies that the complainant is entitled to the relief prayed for in said bill of complaint or any part thereof.

This defendant denies each and every material and relevant allegation in said bill of complaint not herein expressly admitted, and which is contrary to the facts and conclusions set forth in this answer or in defendant's said reports and order, copies of which reports and order are severally hereto attached marked Exhibits A and B, and are made a part of this answer.

This defendant prays the same advantage as to each and all the matters and things aforesaid as this defendant would be entitled to if the same were specially pleaded, or set forth by way of demurrer, or motion to dismiss the petition.

And having answered said bill, this defendant prays to be hence dismissed with its reasonable costs and charges in its behalf sustained.

INTERSTATE COMMERCE COMMISSION,
By
JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel.

CITY OF WASHINGTON, *District of Columbia, ss*:

Judson C. Clements, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named defendant, and makes this affidavit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true as to matters within the knowledge of the Commission, and as to other matters stated therein he believes it to be true.

JUDSON C. CLEMENTS.

Subscribed and sworn to before me, George F. Graham, a notary public within and for the District of Columbia, this 3rd day of October, 1914.

GEORGE F. GRAHAM,
Notary Public.

(Seal)

OPINION No. 2365.

INTERSTATE COMMERCE COMMISSION.

No. 5314.

Allentown Portland Cement Company
vs.
Philadelphia & Reading Railway Company, et al.

No. 5314.

Allentown Portland Cement Company
vs.
Philadelphia & Reading Railway Company, et al.

Submitted May 7, 1913. Decided June 18, 1913.

Defendants' rates on cement in carloads to Baltimore, Philadelphia, New York City, points in New England, and to Jersey City for beyond to the southeast are the same from Evansville, Pa., in the so-called Lehigh district, as from the other cement-producing points in that district. On cement to Jersey City locally their rates are much higher from Evansville than from these other mills. Such relative adjustment on the latter traffic held to subject the city of Jersey City and its traffic to undue prejudice and disadvantage.

William A. Glasgow, Jr., Chester N. Farr, Jr., and George W. Aubrey, for complainant.

William L. Kinter for Philadelphia & Reading Railway Company.

REPORT OF THE COMMISSION.

CLEMENTS, *Commissioner.*

This complaint involves the reasonableness of rates on cement in carloads from Evansville, Pa., to Jersey City and contiguous New Jersey points within the so-called Metropolitan district. Evansville is 10 miles north of Reading, Pa., on the Philadelphia & Reading Railway, which is the only carrier reaching that point. The specific destinations in issue and the delivering carriers are as follows:

Jersey City: Central Railroad of New Jersey; Erie; Lehigh Valley; Pennsylvania. Newark: Central Railroad of New Jersey; Erie; Lehigh Valley; Pennsylvania; Delaware, Lackawanna & Western. Elizabeth: Central Railroad of New Jersey; Pennsylvania. Perth Amboy: Central Railroad of New Jersey; Lehigh Valley; Pennsylvania. Bayonne: Central Railroad of New Jersey; Lehigh Valley; Pennsylvania. Hoboken: Delaware, Lackawanna & Western. Weehawken: Erie.

The various routes are: Philadelphia & Reading to Allentown and Central Railroad of New Jersey or Lehigh Valley; Philadelphia & Reading to Allentown, Central Railroad of New Jersey to Phillipsburg, and Delaware, Lackawanna & Western; Philadelphia & Reading to Allentown, Central Railroad of New Jersey to Easton, Lehigh & New England to Greycourt, and Erie; and Philadelphia & Reading to Philadelphia and Pennsylvania.

Jersey City is the terminal point of these destinations and will be taken as representative for the purposes of this report. The distances to Jersey City via these various routes vary from 136 to 194 miles, and the rate in issue is $1.35 per ton, except that via the route in connection with the Pennsylvania from Philadelphia it is $1.50 per ton.

Evansville is situated in the Lehigh district and is one of numerous cement mills in that district located within a radius of perhaps 20 miles of each other. None of the other mills, however, are reached by the Philadelphia & Reading, they being served by the Central Railroad of New Jersey or Lehigh Valley direct or by short lines of railway which connect with those carriers at distances of from 1 to 16 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading the rate to Jersey City from these competing mills on other lines is 80 cents. Among these latter mills are those located at Nazareth and Bath, on the Lehigh & New England Railroad; at Atlas, on the Northampton & Bath Railroad; at Ormrod, on the Ironton Railroad; at Northampton, on the Central Railroad of New Jersey; and at Copley, on the Lehigh Valley Railroad. On shipments to Jersey City for transshipment by water to points in the southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills; and this equality of Evansville with

the other mills is maintained on traffic to Philadelphia, Baltimore, New York City, and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

The 80-cent rate to Jersey City locally from the other mills is used in connection with shipments destined to New York, that rate plus the trucking charge to all points south of Ninetieth street totaling less than the $1.40 rate to New York proper plus the trucking charge to the same point, the result being that complainant, who must use the latter rate, is effectively barred from competition in that part of the city located south of Forty-third street, which is the greatest cement-consuming district. North of Ninetieth street complainant can compete with the other mills because of their greater expense in the longer truck haul from Jersey City. It will also necessarily be apparent that complainant can not sell any cement in Jersey City for local consumption in competition with these other mills which have the 80-cent rate.

The defense of the case is assumed by the Philadelphia & Reading. Its witness states that the 80-cent rate on shipments destined to the southeast was established from Evansville to meet the competition of the coastwise steamship lines and of the other mills in the Lehigh district, and contends that the local rate of $1.35 in issue is itself below normal, owing in part to competition via the Hudson River from mills located on that river in the upper part of New York state, and that that rate is exceeded at intermediate points by rates as high as $1.75. It is further contended that the 80-cent rate to Jersey City proper from the other mills is abnormally low and is exceeded at intermediate points by rates of from $1.10 to $1.20. All of these intermediate rates are said to be covered by applications for relief from the operation of the fourth section of the act, on file with the Commission. Other comparisons of rates to points in New Jersey, Delaware, Pennsylvania and other states are submitted in support of the contention that the rate complained of is not unreasonable in itself.

Briefly stated, the position of the Philadelphia & Reading is that in meeting the 80-cent rate of the other mills to the southeast and in partially meeting that rate to Jersey City, as is contended it has, that company has gone as far as it consistently can in placing Evansville on a competitive basis with

the other mills in the Lehigh district; that its rate to Jersey City locally is reasonable in itself; and that, as the Philadelphia & Reading does not reach any of the other points from which the 80-cent rate is applicable and has no concern in that rate and no voice in its making, it can not be lawfully chargeable with an undue discrimination against complainant at Evansville in favor of its competitors at those points.

It can not be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the establishment of the 80-cent rate from these other mills, as it can not participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of opinion, and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 18th day of June, A. D. 1913.

No. 5314.

Allentown Portland Cement Company
vs.
The Philadelphia & Reading Railway Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; and The Pennsylvania Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and the Commission having found in said report that in maintaining to Baltimore, Md., New York, N. Y., points in New England, and various other eastern destinations, including Jersey City, N. J., on traffic for beyond to the southeast, rates on cement in carloads which are not higher from Evansville, in the so-called Lehigh district, in Pennsylvania, than their rates contemporaneously charged on similar traffic from Nazareth, Bath, Atlas, Ormond, Northampton, and Copley, also in the said district, while refusing to establish and maintain the same relative adjustment of rates as between Evansville and said other mills on cement shipped to Jersey City, N. J., for local consumption, defendants are subjecting the city of Jersey City, N. J., and its traffic to undue and unreasonable prejudices and disadvantages.

It is ordered, That the above-named defendants, according as their various lines or routes may run, be, and they are hereby, notified and required, on or before September 15, 1913, to cease and desist from said undue and unreasonable prejudices and disadvantages.

It is further ordered, That said defendants, according as

their various lines or routes may run, be, and they are hereby notified and required to establish, on or before September 15, 1913, upon statutory notice to the Interstate Commerce Commission and the general public by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and for a period of two years after said September 15, 1913, to maintain and apply to said transportation rates which will prevent and avoid the aforesaid undue and unreasonable prejudices and disadvantages.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(Seal)

INTERSTATE COMMERCE COMMISSION.

No. 5314.

Allentown Portland Cement Company
vs.
Philadelphia & Reading Railway Company, et al.

Submitted February 16, 1914. Decided July 10, 1914.

Finding in original report that defendants in maintaining or participating in rates on cement in carloads to eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville than the rates which they contemporaneously maintain or participate in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, thereby subject Jersey City and its traffic to undue prejudice and disadvantage, affirmed.

Wm. A. Glasgow, Jr., Chester N. Farr, Jr., and *George W. Aubrey* for complainant.

Wm. L. Kinter for Philadelphia & Reading Railway Company.

Henry Wolf Bikle for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION ON REHEARING.

CLEMENTS, *Commissioner*:

This case is before us for decision upon rehearing granted upon application filed on behalf of defendants by the Philadelphia & Reading Railway Company, which carrier has from the beginning assumed the burden of defense. The case involves the question of the reasonableness and justness of defendants' rate for the transportation of cement in carloads from Evansville, Pa., to Jersey City, N. J. Evansville is reached only by the Philadelphia & Reading Railway. That carrier transports the cement in question from Evansville to Allentown, where it delivers it to one of numerous connections which either transports it to Jersey City or in turn delivers it to other carriers for final delivery at Jersey City. The rate via these various routes is $1.35. Certain of the carriers which receive this Evansville cement from the Philadelphia & Reading at Allentown also serve other mills in the same general vicinity at Allentown, namely, the Lehigh district, either directly or through connections. The rate from these other mills to Jersey City is 80 cents. The Philadelphia & Reading does not participate in the 80-cent rate from any mill in the district. The general situation with respect to the location of these various cement-producing points, the rates applicable therefrom to Jersey City, and our findings in the case are thus stated in the original report, 27 I. C. C., 448, 449:

> "Evansville is situated in the Lehigh district and is one of numerous cement mills in that district located within a radius of perhaps 20 miles of each other. None of the other mills, however, are reached by the Philadelphia & Reading, they being served by the Central Railroad of New Jersey or Lehigh Valley direct or by short lines of railway which connect with those carriers at distances of from 1 to 15 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading the rate to Jersey City from these competing mills on other lines is 80 cents. Among these latter mills are those located at Nazareth and Bath, on the Lehigh & New England Railroad; at Atlas, on the Northampton & Bath Railroad; at Ormond, on the Ironton Railroad; at Northampton, on the Central Railroad of New Jer-

sey; and at Copley, on the Lehigh Valley Railroad. On shipments to Jersey City for transshipment by water to points in the southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills; and this equality of Evansville with other mills is maintained on traffic to Philadelphia, Baltimore, New York City, and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

* * * * * * * * *

"It can not be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the establishment of the 80-cent rate from these other mills, as it can not participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of opinion and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist."

At the rehearing it was testified on behalf of defendant Philadelphia & Reading Railway that the $1.35 rate to Jersey City is applicable not only from Evansville, but also from Chapman, Pa., which with Evansville is situated only on the line of the Philadelphia & Reading. This fact was developed at the original hearing; but it was also developed at that hearing that the owners of the Chapman mill also own mills at stations in the Lehigh district on other lines from which the rate to Jersey City is 80 cents. The owners of the Chapman mill therefore do not experience the handicap in selling cement at Jersey City that complainant does, because they can supply the Jersey City demand from some of their other mills from which the rate is 80 cents.

It was further testified on behalf of the Philadelphia & Reading that there are numerous points in the east other than Jersey City to which the rate is not the same from Evansville as from the mills in the Lehigh district on other lines, as shown by a long list of points of destination contained in an exhibit filed as a part of the record. These points are principally stations of small population, with the exception of a few like Newark, Perth Amboy, Elizabeth and Weehawken, all in New Jersey, which latter as a matter of fact are covered by our findings in the original report. In that report we stated that the specific destinations in issue were Jersey City, Newark, Elizabeth, Perth Amboy, Bayonne, Hoboken, and Weehawken, and that "Jersey City is the terminal point of these destinations and will be taken as representative for the purposes of this report." While in the order we specifically deal only with the rate to Jersey City, the order by its terms makes the report a part thereof. Therefore, with the exception of the points covered by our findings, the fact remains that, as we stated in the report, the "Philadelphia & Reading is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City", and, we may add, the other points in the metropolitan district shown therein which, Jersey City having been taken as representative, it was not necessary for us again to name. Our findings were specifically based upon the relation of the rates from Evansville and mills on other lines in the Lehigh district to eastern consuming points of

equal importance with Jersey City, such as Baltimore, Philadelphia, New York, and points in New England.

It was also testified on behalf of the Philadelphia & Reading that the 80-cent rate to Jersey City applicable from other mills in the Lehigh district than Evansville, via other lines, is unreasonably low and that this is shown by the fact that rates to intermediate points are considerably higher, the intermediate rates being covered by applications for relief from the operation of the fourth section, filed by the carriers with the Commission.

Counsel for the Philadelphia & Reading also questions the soundness of our findings as a matter of law and policy, contending in oral argument that the effect thereof would be "that if a carrier chose to meet the rates of competing carriers from contiguous points of origin in cases where such competing rates were on a fair normal basis, it would have to meet every rate made by its competitors without regard to the revenue involved or business expediency."

We do not apprehend that such embarrassment to defendants as that suggested by counsel would result from our findings in this case. Each case before us must necessarily stand upon its own facts. We are dealing now only with the situation here presented.

We have carefully considered the foregoing and other contentions made upon the rehearing on behalf of defendants, and considering all the facts, circumstances, and conditions appearing we are not convinced that our original findings and conclusions in the case should be reversed. The original order entered in the case was by us vacated and set aside at the time the petition for rehearing was granted. In view of our affirmance herein of the original findings the order will again be entered.

SUPPLEMENTAL ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of July, A. D. 1914.

No. 5314.

Allentown Portland Cement Company

vs.

The Philadelphia & Reading Railway Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; and The Pennsylvania Railroad Company.

This case coming on for rehearing upon petition of the principal defendant, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed an additional report containing its findings of fact and conclusions thereon, which said report, together with the original report, is hereby referred to and made a part hereof; and the Commission having found in said reports that in maintaining to Baltimore, Md., New York, N. Y., points in New England, and various other eastern destinations, including Jersey City, N. J., on traffic for beyond to the southeast, rates on cement in carloads which are not higher from Evansville, in the so-called Lehigh district, in Pennsylvania, than their rates contemporaneously charged on similar traffic from Nazareth, Bath, Atlas,Ormond, Northampton, and Copley, also in the said district, while refusing to establish and maintain the same relative adjustment of rates as between Evansville and said other mills on cement shipped to Jersey City, N. J., for local consumption, defendants are subjecting the city of Jersey City, N. J., and its traffic to undue and unreasonable prejudices and disadvantages:

It is ordered, That the above-named defendants, according as their various lines or routes may run, be, and they are hereby, notified and required, on or before October 1, 1914, to cease and desist from said undue and unreasonable prejudices and disadvantages.

It is further ordered, That said defendants, according as their various lines or routes may run, be, and they are hereby notified and required to establish on or before October 1, 1914, upon statutory notice to the Interstate Commerce Commission and to the general public by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and for a period of two years after said October 1, 1914, to maintain and apply to said transportation rates which will prevent and avoid the aforesaid undue and unreasonable prejudices and disadvantages.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(Seal)

PETITION OF THE ALLENTOWN PORTLAND CEMENT COMPANY FOR RIGHT TO INTERVENE IN THE ABOVE CASE AND TO FILE AN ANSWER THEREIN.

Filed Nov. 9, 1914.

NOW COMES, the Allentown Portland Cement Company, a corporation organized and existing under the laws of the State of New Jersey, and shows that it was the petitioner in the proceeding before the Interstate Commerce Commission referred to in the Bill of Complaint in the above case and therefore it was a party in interest to the proceedings before the Interstate Commerce Commission referred to in said Bill of Complaint in which the orders and requirements were made which are the subject of attack in the above Bill in this Court.

WHEREFORE petitioner, the Allentown Portland Cement Company, prays that an order be entered allowing it to appear as a party defendant to the Bill of Complaint in the case above mentioned that it may have leave to file an answer therein and may be represented by counsel.

And petitioner will ever pray, etc.

ALLENTOWN PORTLAND CEMENT COMPANY,
By GEORGE W. AUBREY,
Attorney.

GEORGE W. AUBREY,
CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel.

ORDER OF COURT.
Filed Nov. 9, 1914.

This case coming on to be heard upon the petition of the Allentown Portland Cement Company and on motion of the said Company by its counsel, Wm. A. Glasgow, Jr., it is adjudged and ordered that the prayer of the said petition be granted and the Allentown Portland Cement Company be and is hereby made a party defendant to the Bill in the case above mentioned and the said Allentown Portland Cement Company having presented its answer to the Bill in the above cause, it is ordered that the same be filed this ninth day of November, A. D. 1914.

FOR THE COURT,
WM. H. HUNT,
Judge.

ANSWER OF THE ALLENTOWN PORTLAND CEMENT COMPANY.
Filed Nov. 9, 1914.

The Allentown Portland Cement Company, having intervened in the above entitled cause by leave of Court, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exceptions to the many errors and insufficiencies in the Bill of Complaint herein contained, for answer thereto or to so much thereof as this respondent is advised is material for it to make answer unto, answering, says:

1-2-3. This defendant admits the allegations of paragraphs 1, 2 and 3 of said Bill of Complaint.

4. Defendant admits that the Allentown Portland Cement Company filed its petition before the Interstate Commerce Commission, a copy of which is attached to the Bill in this case marked "Exhibit A", and admits that the fifth paragraph of said petition is correctly set forth in Paragraph 4 of said Bill, and for the prayer of said petition and the other allegations thereof this defendant refers to the copy of the petition aforesaid and denies any allegation of Paragraph 4 of said Bill inconsistent with the petition aforesaid.

5-6. Defendant admits the allegations contained in Paragraphs 5 and 6 of the Bill of Complaint.

7. Defendant admits that Paragraph 7 of the Bill of Complaint recites correctly the evidence in part before the Commission, but denies that said paragraph recites or sets forth all of the evidence before the Commission pertinent to the issue involved in the case; and defendant further denies that there was any evidence before the Commission showing that there were any "subnormal rates from the cement plants contiguous to Evansville, to Jersey City and vicinity"; and defendant further denies that the sole position of complainants before the Interstate Commerce Commission "in the testimony therein taken was that inasmuch as the Philadelphia & Reading Railway Company issued from Evansville to many places of destination the same rates on cement as were made by competing carriers serving the cement plants contiguous to Evansville", that the Philadelphia & Reading Railway Company should, as to Jersey City and vicinity, "meet from Evansville the subnormal rates established by other carriers from contiguous plants". Defendant also denies that there was "no evidence presented tending to show that the rate of $1.35 per 2000 pounds issued by the Philadelphia & Reading Railway from Evansville to Jersey City and vicinity, was inherently unreasonable", but defendant admits that there was no finding by the Commission other than as set forth in its report and supplemental report herein referred to in said Bill.

8. Defendant admits (referring to paragraph 8, of said Bill), that the Interstate Commerce Commission, on June 8, 1913, filed its report, and that a copy thereof is attached to the Bill marked "Exhibit B", and that in pursuance thereof an order was issued which is annexed to said report; and defendant also admits that the Commission found in its report the facts therein set forth, and that it issued an order to the defendants as charged in the Bill.

9. Defendant admits the allegations of paragraph 9 of said Bill.

10. Defendant admits that the Interstate Commerce Commission filed its supplemental report on July 10, 1914, and affirmed its former findings and entered an order to be effective

October 1, 1914, and that a copy of said report and order is attached to the Bill marked "Exhibit C"; but defendant denies any of the allegations of paragraph 10 of said Bill which are in conflict with or not sustained by the report and order marked "Exhibit C" aforesaid.

11. Defendant admits the allegations of paragraph 11 of said Bill.

12. Defendant denies the allegations of paragraph 12 of said Bill.

13. Defendant denies the allegations of paragraph 13 of said Bill.

14. Defendant denies the allegations of paragraph 14 of said Bill.

15. Defendant denies the allegations of paragraph 15 of said Bill.

And defendant denies each and every material and relevant allegation in said Bill not herein expressly admitted and which is contrary to the facts and conclusions set forth in this answer or in the reports and orders of the Interstate Commerce Commission, copies of which reports and orders are severally attached to the Bill marked Exhibits "B" and "C", and which are made a part of this answer.

And having fully answered said Bill, this defendant prays to be hence dismissed with its reasonable costs and charges in its behalf sustained.

ALLENTOWN PORTLAND CEMENT COMPANY,
By R. S. WEAVER, *Treasurer.*

GEORGE W. AUBREY,
CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel.

STATE OF PENNSYLVANIA, } *ss.*
COUNTY OF LEHIGH. }

R. S. Weaver, the treasurer of the Allentown Portland Cement Co., the above named defendant, makes this affidavit on behalf of said Company; that he has read the foregoing an-

swer and that the statements therein, so far as made of his own knowledge, are true, and so far as made upon information derived from others, he believes the same to be true.

R. S. WEAVER.

Subscribed and sworn to before me, a Notary Public for the County and State aforesaid, this 7th day of November, A. D. 1914.

RAYMOND W. LENTZ,
(Seal) *Notary Public.*
My commission expires March 10, 1917.

ORDER OF COURT.
Filed Nov. 9, 1914.

And now, to wit, November 9, 1914, on motion of Henry S. Drinker, Jr., and William L. Kinter, attorneys for complainant, and by agreement of counsel for the United States, Interstate Commerce Commission and Allentown Portland Cement Company, intervenor, it is ordered that the above entitled case be set down for final hearing on this date on bill and answer, reserving the right of all parties to appeal.

PER CURIAM.

BILL IN EQUITY TO ANNUL AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

OPINION.
Filed Jan. 16, 1915.

Before HUNT and WOOLLEY, *Circuit Judges,* and DICKINSON, *District Judge.*

WOOLLEY, *Circuit Judge*: By the prayer of the bill filed in this case, the court is asked to revoke and annul an order made by the Interstate Commerce Commission against the complainant and other carriers, commanding that they cease

and discontinue certain unreasonable prejudices and disadvantages found to have been occasioned certain localities by tariffs imposed, under the following circumstances:—

The cement manufacturing plant of the Allentown Portland Cement Company is situated at Evansville in a cement region in Pennsylvania known as the Lehigh District. Located elsewhere in the same district are many other cement plants. The mill of the Allentown Company is served only by the Philadelphia and Reading Railway Company, which, excepting at Evansville, serves no other cement mills in the district. The other mills are served by other carriers, which do not serve the mill of the Allentown Company.

The Lehigh District is treated by all the carriers as a "locality", and all the carriers serving all the mills located therein participate in making and maintaining relatively the same rates for transporting cement from mills variously situated in the district to destinations east and south, excepting to Jersey City. With respect to this exception, the several carriers which serve the mills of the Lehigh District other than the mill of the Allentown Company, charge a rate of 80c. per ton from their respective points of shipment to Jersey City; and the Reading Company, which serves exclusively the mill of the Allentown Company, charges two rates from the plant at Evansville to Jersey City, namely, 80c. per ton for cement destined for transshipment to coastwise ports, and $1.35 a ton for cement intended for local consumption.

The Allentown Company filed a petition with the Interstate Commerce Commission alleging that the rate of $1.35 from Evansville to Jersey City for cement for local consumption charged by the Reading Company, was, first, unjust and unreasonable, and, second, that it unduly discriminated against it and against the locality in which its plant was located. No contention was made that in fixing rates for cement from Evansville and from other points upon its line, the Allentown Company or the locality of Evansville was thereby discriminated against. The contention was that in participating with the other carriers serving other mills in the same district in making and maintaining for the district the same relative rates to all competing points save Jersey City, the Reading Company by this exception, discriminated against the Allentown Company and against Evansville as the locality in which its plant was situate. The Commission did not find the rate

unreasonable, nor did it expressly find that by the rate the Allentown Company or the locality of Evansville was discriminated against, although in its report the Commission expressed the opinion that by the rate the Allentown Company was caused to labor under a prohibitory disadvantage in marketing its product in Jersey City in competition with other mills in the same manufacturing district: but found that by the rate, Jersey City was prejudiced and discriminated against. Upon the report of the Commission, the Reading Company filed a motion for a re-hearing. The motion was allowed and a further hearing had, at which further testimony was taken. Upon the re-hearing, the Commission made a like finding that by the rate imposed, the locality, not of Evansville but of Jersey City, was prejudiced and discriminated against, and upon that finding based the order now before us for review, directing the Reading Company to cease and desist charging the rate complained of and to establish another that would avoid the prejudice and discrimination occasioned by the former.

It is conceded that findings of fact by the Interstate Commerce Commission are not reviewable, but it is urged by the complainant that the matters here submitted are questions of law, which involve the power of the Commission to perform the act complained of, and when specified, are,

First: (a) Whether the Commission has power to make a finding of discrimination against a locality when that locality or one of its citizens is not a complainant;

(b) Whether under the pleadings the Commission has power to find discrimination against a locality not therein specially designated as the locality discriminated against; and

Second: Whether undue discrimination against a locality, as contemplated by the statute, is restricted to discrimination in rates by a carrier between points exclusively upon its own line, entirely without regard to its effect upon commerce or the movement of traffic; or extends to a discrimination against a locality caused by a carrier fixing a rate from one point to another on its own line that is relatively different from rates which it and other carriers participate in making for competing points upon the lines of all of them.

First: The order in controversy was made under Section 3 of the act to regulate commerce, which among other things pro-

vides—"that it shall be unlawful for any common carrier, * * * to subject any particular person, company, firm, corporation *or locality*, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The manner of invoking the protection of this provision of the Act appears in Sections 13 and 15, as follows:—

> "That any person, firm, corporation, company or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of any thing done or omitted to be done by any common carrier * * * in contravention of the provisions thereof, may apply to the said Commission by petition * * * whereupon such common carrier shall be called upon to satisfy the complaint or to answer the same * * *."

It is further provided that

> "The said Commission shall have the same powers and authority to proceed with an inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Section 15, as amended, provides

> "That whenever, after a full hearing upon a complaint made as provided in Section 13 of this Act or after full hearing under an order for investigation and hearing made by the Commission on its own initiative either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any * * * * practices whatsoever of such carrier or carriers * * * * are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and em-

> powered to * * * make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist * * * *."

The question whether the Interstate Commerce Commission has power to find discrimination against one locality in a proceeding instituted upon complaint, charging discrimination against another locality, depends, first, upon the related circumstances of the case, and, second upon the purpose for which the Commission was created and the mischief which it was intended to remedy.

The Interstate Commerce Commission, while possessing quasi judicial powers, is primarily an administrative body. From the legislative and judicial history of the Act it appears that the purpose of the Act under which the body was created, "is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences and discriminations." Texas and Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 233. In the case of the United States vs. Louisville and Nashville Railroad Company et al., decided December 7th, 1914, the Supreme Court of the United States, speaking through Mr. Chief Justice White, said:—

> "It is not disputable that from the beginning, the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed, and the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct, in case of judicial review * * * * show the progressive evolution of the legislative purpose."

The promotion and facilitation of commerce, being the purpose for which the statute was enacted and the Commission created, with power conclusively to determine the existence of prejudice and discrimination, the Supreme Court has from time to time recognized the administrative character of the Commission as the instrument to effectuate that purpose. The

Commission, therefore, being more of an administrative than a judicial tribunal, is not restricted in its procedure by the technical rules that prevail in tribunals that are entirely judicial. In its capacity of a judicial tribunal, the Commission may decide questions between shippers and carriers upon complaint filed by one or the other in proceedings regularly instituted by one against the other, or, within its broader sphere, it may regulate commerce in respect to a matter in which there may exist no distinct parties in controversy, or as a consequence of which, damage may not be claimed or sustained by any party to the investigation. It may institute of its own motion an inquiry as to a matter within its jurisdiction, and make and enforce its orders as in a proceeding instituted by an injured party. With such power and with all the parties before it in a proceeding instituted by petition, as the one under consideration, it is not contemplated that the Commission, acting within its administrative sphere, should be restricted in its finding or its order to the precise point in dispute presented by the pleadings, as in an action at law, but may extend its inquiry and affix its order to other matters developed in the proceeding, which may be germane to the matter in inquiry, and which are involved in the complaint and included in the consideration of the principal point in controversy, provided always that the parties are not taken by surprise and to them is afforded an opportunity to present evidence upon which the Commission may make a finding concerning both the original and the related matter. New York Central & H. R. R. Co. vs. Interstate Commerce Commission, 168 Fed. 131, 138.

In the case under consideration the defendant was summoned to answer and defend the charge that the rate complained of was a rate on cement between Evansville and Jersey City prejudicial to the locality of the former. It has been held by the Supreme Court that "in considering whether any locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment." Texas and Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 197, 233. Whether or not the defendant was conversant with this rule and was unprepared to defend the charge of discrimination against Jersey City by the rate in controversy, if was aware of the Commission's

view upon its first report and then was given an opportunity to defend, and did defend, on a rehearing, against the charge of discrimination against Jersey City. Therefore, while the defendant may not have entered the proceeding with a knowledge of all it had to meet, it was afforded an opportunity to meet all that was charged against it before the hearing was closed and the final order made. Furthermore, the record fails to disclose any objection by the defendant to the scope of the inquiry.

The petition in the proceeding instituted by the Allentown Company, while charging discrimination by the defendant against it and the locality in which its plant was situate, nevertheless charged that the rate imposed for the shipment of cement from Evansville to Jersey City was the discriminatory act which formed the basis of its complaint. The rate was one imposed for the transportation of cement from one locality to the other, in the first of which existed the seller, and in the latter of which resided the purchaser. The defendant was notified that it was called upon to defend that rate, and although discrimination is charged against the former locality, it is difficult to see, in a case like this, how discrimination against one locality will not correspondingly affect unjustly the other, that is, it is difficult to see how a discrimination against the purchaser at one point is not a discrimination against the seller at the other point. When discrimination respecting traffic between the two points is the only question in issue, the carrier cannot complain that it was not afforded an opportunity to defend the tariff imposed, nor to defend against a possible finding of discrimination against the locality of the purchaser at one end of the route, as well as against the locality of the shipper at the other end. The whole question of discrimination related to the whole transaction of commerce and its movement in trade from the maker to the consumer. The route was the same. The rate was the same, and if discriminatory, the injury existed as well to one locality as to the other, in that it impeded commerce and prevented a purchaser buying as well as a vendor selling. In this case, the finding of the Commission that the rate prejudiced Jersey City, was based upon evidence to meet which an opportunity by a rehearing was afforded the defendant, and the fact that much of the evidence upon which the finding was based was the same that was introduced for the purpose of proving

prejudice to the locality of the seller is unimportant, inasmuch as it was likewise sufficient to find prejudice against the locality of the purchaser. The thing that was made the subject of the order, was involved in the complaint and established by evidence.

Is there any question that the Commission, with the parties before it, could have made the finding of discrimination against Jersey City if the inquiry had been based upon the complaint of Jersey City, or upon a like proceeding instituted of its own motion? If not, then with the parties before it and with the discriminatory effect of the rate against the locality of Jersey City, being necessarily linked with and related to any question of discrimination against the locality of Evansville, and being openly made a part of the controversy, we see no reason why in that proceeding the Commission could not make the same finding and order as it could have made if the proceeding had been otherwise instituted. We are of opinion that traffic with the locality of Jersey City is so related to traffic with the locality of Evansville, the two localities being the termini of the journey for which the rate in controversy was fixed, that in the proceeding as instituted and conducted, the Commission possessed the power to find discrimination against either one locality or the other.

Second: The remaining question presented from the viewpoint of the defendant, briefly stated, is whether the Commission in finding discrimination, is restricted to discriminatory rates fixed by a carrier between different points upon its own line, or whether the Commission has power to find discrimination against a locality, because a carrier, serving that locality, does not conform its rates to lesser rates fixed by competing carriers. We do not think that this case presents in the abstract the question thus suggested by the defendant; nor do we think the Commission compelled the defendant carrier to adjust its rate because independent carriers charged lesser rates.

At first view it would appear that the defendant carrier established a rate from one locality to another on its own line, and that other carriers established on their lines lesser rates between the same localities, and for that reason the defendant was coerced to lower its rate, with the result that its rate was not fixed by itself but was fixed by its competitors. That is not the reason which underlies the order of the Com-

mission. The reason for the Commission's order exists in the fact that joint rates on cement from the Lehigh District to points of distribution east and south, had been made by all the carriers serving the different mills in that district. In this joint tariff, the Reading Company uniformly and consistently participated, excepting in the rate to Jersey City. Even in that rate the Reading Company participated when the cement delivered for carriage was destined for transshipment to coastwise ports, but for cement intended for local consumption it made an exception, and fixed a rate from Evansville to Jersey City that excluded the Evansville cement from the Jersey City market. The act of excepting Jersey City from the advantages of traffic rates, which in participation with other carriers it accorded other localities, was the act of the Reading Company and not the act of its competitors. The act of withdrawing from Jersey City the right it afforded all other localities on relatively the same terms to procure the transportation of Evansville cement, was the act of the Reading Company and not of its competing carriers. The act which in effect prohibited the sale of Evansville cement in the Jersey City market, and conversely, prohibited the Jersey City market resorting for cement to the Evansville locality, thereby stopping commerce in that commodity between the two localities, was the act not of its competitors but of the Reading Company itself.

From these acts of the Reading Company, which were all acts of its own and by which Jersey City was singled out as the one locality to be excepted from the advantages of relatively equal rates, accorded all other localities of cement distribution, the Commission found that the Reading Company had discriminated against Jersey City, and accordingly ordered it to cease and desist from maintaining a rate that produced such a prejudice and discrimination.

The effect of excepting Jersey City from relatively the same rates which the Reading Company had participated with other carriers in prescribing for traffic from the Lehigh cement region to markets south and east, was to stop traffic in cement from Evansville to Jersey City and make impossible the purchase of Evansville cement either in Jersey City or in New York City below Forty-third Street by consumers in either or both of those very large purchasing districts. The power of the Commission to find discriminatory such an exception to the joint traffic arrangement entered into, depends in this case

upon the purpose and intent of the Act which created the Commission. The purpose of the Act, as pronounced by the Supreme Court, "is to promote and facilitate commerce". This is its primary object. This is the end sought to be attained. This is the thing intended to be accomplished. To effectuate this purpose, there is conferred upon the Commission power to adopt "regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations", and "in passing upon questions arising under the Act, the tribunal appointed to enforce its provisions, whether the Commission or the Courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation." The Supreme Court has further held that in the exercise of its jurisdiction, in promoting and facilitating commerce, as applied to the situation before it, the tribunal "may and should consider the legitimate interests, as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment," and when the act "says that no locality shall be subjected to an undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also *under the terms and the spirit of the act* to enter into the question." Texas Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 197, 220, 233.

The situation in this case embraces two localities, and the welfare of the locality to which the goods are sent enters as readily into the situation as the welfare of the locality from which they are sent. If the jurisdiction of the Commission were restricted to the regulation of the railroads, as distinguished from the regulation of commerce, the question presented might be different, but as the function and jurisdiction of the Commission is the regulation of commerce and not the regulation of railroads, except in so far as they are instruments of commerce, the question resolves itself into the power of the Commission to regulate commerce between the localities affected by the rate in controversy.

The Commission has found as a matter of fact that in excepting the rate between Evansville and Jersey City from its otherwise complete participation in the relative rates established by all carriers from the Lehigh District to points of distribution, commerce in cement between Evansville and Jersey City has been impeded, traffic arrested, undue advantage afforded shippers from other points in the same shipping district and undue prejudice and discrimination exerted against purchasers in the purchasing district. This finding of fact cannot be disturbed by this court if the Commission in so finding acted within its powers. It is difficult to lay down any general principle defining or limiting the purpose of the act and the power of the Commission created under it, and such is not attempted in this case, but under the facts of this case, we are of opinion that a finding by the Commission of undue discrimination effected by the rate imposed, was within its power, and as that finding was a finding of fact, concerning the wisdom or expediency of which this court has nothing to do, the order should not be disturbed.

The bill is dismissed.

FINAL DECREE.
Filed Feby. 18, 1915.

Before DICKINSON, *J.*

This cause came on for final hearing at this Term and was argued by counsel; and thereupon, upon consideration thereof it was ORDERED, ADJUDGED, and DECREED as follows, viz:

First. That the prayer of the petition be and the same is hereby denied and that the said petition be and the same is hereby dismissed.

Second. That the respondents and each of them recover from the petitioner their several and respective costs in this behalf expended and that execution issue therefor.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

February 16, 1915.

PETITION FOR APPEAL.
Filed Feby. 18, 1915.

To the Honorable the Judges of the said Court:

Your petitioner, Philadelphia & Reading Railway Company, appellant in the above entitled cause, feeling itself aggrieved by the interlocutory and final decree of this court rendered on the 16th day of February, 1915, in favor of appellees in the above entitled cause, prays an appeal to the Supreme Court of the United States in accordance with the Acts of Congress made and provided.

The particulars wherein the Philadelphia & Reading Railway Company considers said decree erroneous are set forth in the Assignments of Error filed herewith and to which reference is hereby made; and the Philadelphia & Reading Railway Company further prays that a transcript of the record, proceedings and papers on which the said decree was made and entered, duly authenticated, may be transmitted to the Supreme Court of the United States.

WM. L. KINTER,
HENRY S. DRINKER, JR.,
Attorneys for the Philadelphia & Reading Railway Co.

ORDER ALLOWING APPEAL.
Filed Feby. 18, 1915.

Before DICKINSON, *J.*

The above appellant having prayed an appeal from the decree rendered by this court in the above entitled cause on the 16th day of February, 1915, to the Supreme Court of the United States, and said appellant having filed with the Clerk of this Court its petition for appeal, together with the assignment of error and appeal bond, which bond has been duly approved by the court;

It is ordered and adjudged and decreed by the court that such appeal be granted and allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

The foregoing is hereby approved for entry this 18th day of February, 1915.

BY THE COURT.
Attest:
GEORGE BRODBECK,
Deputy Clerk.

ASSIGNMENTS OF ERROR.
Filed Feby. 18, 1915.

And now February 18, 1915, comes Philadelphia & Reading Railway Company by its counsel, William L. Kinter and Henry S. Drinker, Jr., and in connection with their application for appeal file the following assignments of error on which they will rely upon said appeal to the Supreme Court of the United States from the final decree of the District Court for the Eastern District of Pennsylvania entered February 16, 1915, in the above entitled cause.

The District Court erred:

1. In holding that for a carrier to refuse to conform its rates to a particular locality to the lesser rates fixed by competing carriers from contiguous points of origin to the same locality constitutes undue discrimination.

2. In dismissing the bill filed in the above entitled cause.

3. In entering the following order dismissing the Bill:

> This cause came on for final hearing at this Term and was argued by counsel; and thereupon, upon consideration thereof; it was ORDERED, ADJUDGED and DECREED as follows, viz:
>
> First. That the prayer of the petition be and the same is hereby denied and that the said petition be and the same is hereby dismissed.
>
> Second. That the respondents and each of them recover from the petitioner their several and respective costs in this behalf expended and that execution issue therefor.

4. In holding that the Interstate Commerce Commission had power and authority to enter the order sought to be enjoined, set aside, annulled and suspended in this case.

5. In holding that the Interstate Commerce Commission has power and authority to enter an order in favor of a local-

ity which is not a party to the proceedings then pending before said Commission.

6. In holding that the Interstate Commerce Commission has power and authority to enter an order finding and prohibiting a discrimination not the subject matter of a complaint then pending before the Commission, or of an investigation instituted by the Commission of its own motion, specific notice whereof has not been given to the carrier in accordance with the provisions of the Act to Regulate Commerce and the acts supplementary thereto and amendatory thereof.

7. In finding as follows, in the course of its opinion:

> "The mill of the Allentown Company is served only by the Philadelphia & Reading Railway Company, which, excepting at Evansville, serves no other cement mills in the district."

8. In holding that under the facts found by the Interstate Commerce Commission in its report and supplementary report constitute a violation of the provisions of the Act to Regulate Commerce and the Acts supplementary thereto and amendatory thereof.

9. In holding that the finding of the Interstate Commerce Commission, on which the order here sought to be set aside is based, is a finding of fact not reviewable and which cannot be disturbed by the United States courts.

10. In refusing to enter a final decree enjoining, setting aside, annulling and suspending the order of the Interstate Commerce Commission, the subject matter of the said bill, and perpetually enjoining enforcement of said order.

11. In refusing to enter a decree granting the relief prayed in the said bill.

Wherefore Philadelphia & Reading Railway Company prays that the said final decree of the District Court of the United States for the Eastern District of Pennsylvania entered February 16, 1915, be reversed, annulled and set aside and that the Supreme Court of the United States will enter on the record such order and decree as will be meet and proper in the premises.

WM. L. KINTER,
HENRY S. DRINKER, JR.,
Counsel for Philadelphia and Reading Railway Company,
Petitioner and Appellant.

APPEAL BOND.

Filed Feby. 19, 1915.

KNOW ALL MEN BY THESE PRESENTS that Philadelphia & Reading Railway Company as principal and United States Fidelity & Guaranty Company as surety are held and firmly bound unto the United States of America in the sum of Five hundred dollars ($500) to be paid to the said United States of America, for the payment of which well and truly to be made, we hereby bind ourselves, our successors and assigns firmly by these presents.

Sealed with our seals this 18th day of February, A. D. 1915.

WHEREAS, the above named Philadelphia & Reading Railway Company has prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered in the above entitled cause by the District Court of the United States for the Eastern District of Pennsylvania on the 16th day of February, A. D. 1915;

NOW, THEREFORE, the condition of this obligation is such that if the above named Philadelphia & Reading Railway Company shall prosecute said appeal with effect and answer all damages and costs if it fails to make good its said appeal, then this obligation shall be void, otherwise it shall remain in full force and virtue.

PHILADELPHIA & READING RAILWAY COMPANY,
By THEODORE VOORHEES,
President.

(Seal)

Attest: GEO. ZEIGLER,
Secretary.

UNITED STATES FIDELITY & GUARANTY CO.,
By HENRY STROUSS,
Resident Vice President.

(Seal)

Attest: WINIFRED S. CALDWELL,
Resident Secretary.

Before DICKINSON, *J.*

Bond approved and accepted this 18th day of February, A. D. 1915.

BY THE COURT,
Attest:
GEORGE BRODBECK,
Deputy Clerk.

PRAECIPE SUR TRANSCRIPT.
Filed Apr. 1, 1915.

To the Clerk of the District Court of the United States for the Eastern District of Penna.:

Dear Sir:

In making up the transcript of the record in the appeal in the above entitled case, please include the following papers and no others:

1. Docket Entries.
2. Bill.
3. Answer of the United States and Interstate Commerce Commission.
4. Petition of Cement Company and order thereon.
5. Answer of Cement Company.
6. Order setting case down for final hearing.
7. Opinion.
8. Decree.
9. Petition for appeal.
10. Order allowing appeal.
11. Bond sur appeal.
12. Assignments of error.
13. Citation.

Very truly yours,

HSD/OJM H. S. DRINKER, JR.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To the United States of America;
Interstate Commerce Commission;
Allentown Portland Cement Company;

Greeting:

You are hereby cited and admonished to be an appear at the Supreme Court of the United States, to be holden at the City of Washington within thirty days, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, Eastern District of Pennsylvania, wherein Philadelphia & Reading Railway Company is Appellant and you are Appellees, to show cause, if any there be, why the decree ren-

dered against the said Appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Oliver B. Dickinson, Judge of the District Court of the United States, this 12th day of March in the year of our Lord one thousand nine hundred and fifteen.

OLIVER B. DICKINSON,
District Judge.

Service accepted.

FRANCIS FISHER KANE,
U. S. Atty.

WM. A. GLASGOW, JR.,
CHESTER N. FARR, JR.,
Attorneys for Appellees.

CHAS. W. NEEDHAM,
Counsel for Interstate Commerce Commission.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA. } *sct.*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings in the matter of Philadelphia & Reading Railway Company v. United States of America, et al., No. 1307, June Session, 1914, as per praecipe filed, a copy of which is hereto attached, now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 30th day of March, (Seal) in the year of our Lord one thousand, nine hundred and fifteen, and in the one hundred and thirty-ninth year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the Supreme Court of the United States.

OCTOBER TERM, 1914. NO. 937.

Philadelphia & Reading Railway Company, Appellant.

vs.

The United States of America (Interstate Commerce Commission, and Allentown Portland Cement Company, Intervening Respondents), Appellees.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

STATEMENT.

The Allentown Portland Cement Company, in November, 1912, filed before the Interstate Commerce Commission a complaint against the Philadelphia & Reading Railway Company and certain other railroads attacking the rate on cement participated in by the Philadelphia & Reading Railway Company from Evansville, Pa., of $1.35 per ton to Jersey City, N. J., on the ground that this rate was unreasonable and discriminatory against complainant and Evansville as compared to the rate of 80 cents

per ton charged by other carriers from points near Evansville to Jersey City.

It appeared in the evidence taken before the Commission in pursuance of this petition, and the Commission found, that the Philadelphia & Reading Railway Company was the only carrier serving Evansville and did not touch the other points from which the 80 cent rate was charged by the other carriers.

The Commission did not find that the rate of $1.35 was unreasonable, or that its exaction resulted in a discrimination against Evansville, but held that, because the Philadelphia and Reading Railway Company joined in other rates from Evansville to points other than Jersey City, such as Washington, Baltimore, New York and New England points, which rates were no higher than the rates charged to such points by the other carriers from points contiguous to Evansville, it constituted a discrimination against Jersey City for the Reading to refuse to meet the 80 cent rate of such competing carriers from the points of production on other lines to Jersey City.

The Commission accordingly issued an order requiring the defendants to desist from the undue preference of Jersey City so found to exist.

Before the effective date of such order, the Philadelphia and Reading Railway Company filed a Bill to enjoin, set aside, annul and suspend the order of the Commission on the ground that from the Commission's report it was apparent, as a matter of law, that no violation of the act had been committed by defendants and that the Commission, having misconstrued the act, had exceeded its powers in issuing the order sought to be enjoined.

To this Bill the United States filed an Answer, which was virtually a demurrer to the Bill; the Allentown Portland Cement Company and Interstate Commerce Commission each filed intervening petitions and answers, which like the Answer of the United States, merely denied equity of the complainants' Bill.

The case was set down on Bill and Answer for final hearing before Judges Hunt, Woolley and Dickinson, and after argument the Court dismissed the Bill. From the order thus issued the Philadelphia and Reading Railway Company appealed, by petition filed February 18th, 1915, and duly filed its assignments of error and appeal bond.

MOTION TO ADVANCE.

Now comes the appellant in the above entitled cause pending before this Honorable Court on appeal issued and directed to the United States District Court for the Eastern District of Pennsylvania, by their attorneys, William L. Kinter, Henry S. Drinker, Jr., Charles Heebner and Samuel Dickson, and respectfully represents:—

That the cause so pending before this Honorable Court is an appeal from an order by the District Court dismissing a bill to enjoin an order of the Interstate Commerce Commission.

That by the provisions of the Interstate Commerce Acts, appeals to this Honorable Court in such causes have priority in hearing and in determination over all other causes except criminal causes in said Court.

Wherefore your petitioners pray that the above entitled cause may be advanced in accordance with the provisions of said Acts of Congress.

Respectfully submitted,

WILLIAM L. KINTER,
HENRY S. DRINKER, JR.,
CHARLES HEEBNER,
SAMUEL DICKSON,
Attorneys for Appellants.

I acknowledge receipt of a copy of the foregoing motion and of notice that the same will be presented to the Supreme Court of the United States on May 17, 1915.

BLACKBURN ESTERLINE,
Attorney for United States.

CHAS. W. NEEDHAM,
Attorney for Interstate Commerce Commission.

WM. A. GLASGOW, JR.,
Attorney for Allentown Portland Cement Company.

No. [redacted]440

OCTOBER TERM, 1915

IN THE
Supreme Court of the United States.

PHILADELPHIA & READING RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA; (INTERSTATE COMMERCE COMMISSION, AND ALLENTOWN PORTLAND CEMENT COMPANY, INTERVENING RESPONDENTS), Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, OF JUNE TERM, 1914, No. 1307.

WILLIAM L. KINTER,
Reading Terminal, Philadelphia;
HENRY S. DRINKER, Jr.,
Bullitt Building, Philadelphia,
For Appellant.

CHARLES HEEBNER,
Reading Terminal, Philadelphia;
ABRAHAM M. BEITLER,
Bullitt Building, Philadelphia,
Of Counsel.

Allen, Lane & Scott, Prs., Philadelphia.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914. NO. 937.

Philadelphia and Reading Railway Company, Appellant,

vs.

The United States of America (Interstate Commerce Commission and Allentown Portland Cement Company, Intervening Respondents), Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA, OF JUNE TERM, 1914, NO. 1307.

STATEMENT OF THE CASE.

This is an appeal from the decree of the District Court for the Eastern District of Pennsylvania, dismissing a bill filed by the Philadelphia and Reading Railway Company to restrain the enforcement of an order of the Interstate Commerce Commission.

In November, 1912, the Allentown Portland Cement Company (one of the intervening respondents) presented the Commission a petition alleging that the $1.35 rate on cement for local consumption charged by the Reading Company from Evansville, Pa., to Jersey City, N. J., was unjust and unreasonable, and unduly discriminated against the Cement Company and against Evansville, the locality in which its plant was located.

In pursuance of this petition a hearing was held before the Commission, as a result of which the Commission negatived the contention as to the inherent unreasonableness of the rate, failing to hold it to be unreasonable.

As regards the question of discrimination, no contention was made by the petitioner that the rates from other points on the line of the Reading to Jersey City were discriminatory as compared to the rate from Evansville, nor yet that the Reading made or participated in rates to points other than Jersey City which were unreasonably low or discriminatory as compared to the rate to Jersey City.

In other words, no attack was made either on the reasonableness or on the relation of the rates the fixing of which was controlled by the Reading or in which it had a voice.

The following situation, however, was presented and was adopted by the Commission as the basis for the order here sought to be annulled.

Evansville is one of a number of points in what is known as the Lehigh Cement District, and is served only by the Reading. A number of other points in this district are served by other carriers and not touched by the Reading.

The Reading, serving Evansville, and the other carriers, serving the other points in the district (of which we may use Cementon on the Lehigh Valley as typical) fixed the same rates to various points, the principal points in question being Baltimore, Philadelphia, New York and points in New England, the rate to Baltimore being $1.65, to Philadelphia, $1.20, to New York, $1.40, to New England inland points $2.25 and to coast points, $1.85.*

* The respective short line distances are, to Baltimore 160 miles, to Philadelphia 69 miles, to New York 136 miles, and to New England varying distances depending on the point in question. On the principle of the decision of the Commission and the District Court it is immaterial what are the actual rates or distances to these points. For convenience, however, the actual rates and distances are mentioned, such being the rates in effect at the date of the hearing before the Commission.

Jersey City is situated in what is termed the "Metropolitan District," consisting of a number of New Jersey points, the distance from Evansville varying from 135 to 194 miles, according to the route used. These points are principally stations of small population, with the exception of a few like Newark, Perth Amboy, Elizabeth, Weehawken and Jersey City, the latter of which is referred to by the Commission as typical. To these points the rate by the Reading from Evansville was $1.35, while that by the other carriers from the other points not reached by the Reading was 80 cents.

By the use of the 80-cent rate the shipper from Cementon on the Lehigh Valley Railroad could send his cement to Jersey City for 80 cents and there unload it on a truck and take it across to New York at a total charge to all points below 43d Street (the greatest cement-consuming district) less than the regular $1.40 rate charged by all roads to New York. The shipper from Evansville, however, could not avail himself of this method of securing a total charge less than the New York rate, because the rate by the Reading to Jersey City was $1.35. The Evansville shipper was also under a disadvantage of 55 cents in competing locally in Jersey City with the shipper from Cementon and from the other points not served by the Reading.

It further appeared from the original petition before the Commission that on traffic for transshipment by steamer to points in the southeast, such as Charleston and Savannah, the Reading, to meet competition by water, participated in an 80-cent rail rate to Jersey City, but this circumstance was not relied on by the Commission or made the basis for its order.

The position of the Reading was that its $1.35 rate was reasonable, being in itself a competitive rate exceeded at intermediate points by rates as high as $1.75, the latter being the subject of pending applications under the Fourth Section; that the 80-cent rate charged by the other carriers was a sub-normal rate which they might charge if they chose, but which it was not bound

to follow, it being proportionately lower than, and obviously out of line with, the other reasonable rates fixed by the Reading, notably the rate of $1.40 to New York.

The Commission did not find that the rate of $1.35 charged by the Reading from Evansville to Jersey City was unreasonable.

It did not find that the Reading's issuance of an 80-cent transshipment rate to southeastern ports effected an undue preference in favor of Charleston and Savannah over Jersey City.

It did not find that the Reading discriminated against Evansville by charging preferential rates to Jersey City from other points on its own line.

It did not find that the Reading's $1.65 rate to Baltimore, its $1.20 rate to Philadelphia, its $1.40 rate to New York, or its $2.25 rate to New England were discriminatory compared to its $1.35 rate to Jersey City, nor that there was any other improper relation between the rates charged or participated in by the Reading between points on its own line or lines with which it joined in through routes.

It did not hold that either the Allentown Portland Cement Company or Evansville were discriminated against by the Reading.

It held, however, that "in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia and Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage from which an order will be entered to cease and desist."

In other words, the Commission held that because the Reading maintained from Evansville to Baltimore,

Philadelphia, New York and New England points the same rates as those charged by the other carriers from the cement-producing points served by them and not touched by the Reading, it constituted a violation of the Act to Regulate Commerce for the Reading to refuse to meet from Evansville the competitive rate of such other carriers from their points of production to Jersey City.

Subsequent to the order issued in pursuance of the foregoing finding a rehearing was held and additional testimony taken, after which the Commission confirmed and reissued its original order directing the cessation of the discrimination against Jersey City so found to exist.

The Reading filed the present Bill to have the foregoing order annulled. Answers were filed by the United States and also by the Commission and by the Allentown Portland Cement Company, which intervened for this purpose.

The case was set down for final hearing, on Bill and Answers, and argued before Judges Dickinson, Woolley and Hunt, by whom the Bill was dismissed.

From the order dismissing the Bill the Reading took the present appeal.

Specifications of Error.

And now, February 18, 1915, comes Philadelphia and Reading Railway Company by its counsel, William L. Kinter and Henry S. Drinker, Jr., and in connection with their application for appeal filed the following assignments of error on which they will rely upon said appeal to the Supreme Court of the United States from the final decree of the District Court for the Eastern District of Pennsylvania entered February 16, 1915, in the above-entitled cause.

The District Court erred:

1. In holding that for a carrier to refuse to conform its rates to a particular locality to the lesser rates fixed

by competing carriers from contiguous points of origin to the same locality constitutes undue discrimination.

2. In dismissing the Bill filed in the above-entitled cause.

3. In entering the following order dismissing the Bill.

"This cause came on for final hearing at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED and DECREED as follows, viz:

First.—That the prayer of the petition be and the same is hereby denied and that the said petition be and the same is hereby dismissed.

Second.—That the respondents and each of them recover from the petitioner their several and respective costs in this behalf expended and that execution issue therefor."

4. In holding that the Interstate Commerce Commission had power and authority to enter the order sought to be enjoined, set aside, annulled and suspended in this case.

5. In holding that the Interstate Commerce Commission has power and authority to enter an order in favor of a locality which is not a party to the proceedings then pending before said Commission.

6. In holding that the Interstate Commerce Commission has power and authority to enter an order finding and prohibiting a discrimination not the subject matter of a complaint then pending before the Commission, or of an investigation instituted by the Commission of its own motion specific notice whereof has not been given to the carrier in accordance with the provisions of the Act to Regulate Commerce and the Acts supplementary thereto and amendatory thereof.

7. In finding as follows, in course of its opinion:

> "The mill of the Allentown Company is served only by the Philadelphia and Reading Railway Company, which, excepting at Evansville, serves no other cement mills in the District."

8. In holding that the facts found by the Interstate Commerce Commission in its report and supplementary report constitute a violation of the provisions of the Acts to Regulate Commerce and the Acts supplementary thereto and amendatory thereof.

9. In holding that the finding of the Interstate Commerce Commission, on which the order here sought to be set aside is based, is a finding of fact not reviewable and which cannot be disturbed by the United States Courts.

10. In refusing to enter a final decree enjoining, setting aside, annulling and suspending the order of the Interstate Commerce Commission, the subject matter of the said Bill, and perpetually enjoining enforcement of said order.

11. In refusing to enter a decree granting the relief prayed in the said Bill.

ARGUMENT.

The Questions Presented.

The opinion of the District Court dismissing the present Bill deals with two distinct questions of law presented by this record; the first, a question of pleading or procedure, whether the Commission had power to make the order in favor of Jersey City when no Jersey

City merchant or representative complained and without instituting of its own motion a new proceeding with this as its avowed object; the second, whether the facts found by the Commission constituted a violation of the Act.

The District Court appears to have considered these questions as of equal importance, devoting if anything more space in its opinion to the first than to the second.

From the point of view of the appellant, however, and for that matter of every other railroad in the country, the second question is of such vast and far-reaching significance that it completely overshadows any mere question of procedure. For the purposes of the present argument we will refer to the considerations discussed by the Court under the first point, not as a distinct and independent ground for sustaining the present appeal, but merely in connection with their bearing on the real question in the case,—is a violation of the substantive law here presented?

In other words, we do not here contend that this Court should reverse the decree of the District Court and annul the order of the Commission merely because the Commission's order was in favor of Jersey City while the complaint came from Evansville, but that this circumstance is significant in considering the soundness of the Commission's ruling on the real question in the case.

Being forced to the conclusion that the Reading was not discriminating against the original complainant or against Evansville, since the Reading did not participate in the rate which was alleged as producing the discrimination, the Commission of its own motion turned the case upside down, and without instituting a new proceeding to correct the alleged violation of law thus found, held that Jersey City was being unduly prejudiced, and this although no citizen or representative of Jersey City was complaining.

Rules of pleading and procedure restricting the decrees of Courts to the issues presented by the parties were

formulated as it was discovered how easily a Court might err when it took it upon itself to go outside the record and to decide questions not presented directly for decision by the parties to the litigation.

While the rules of pleading before the Commission are not of the same strictness as those applicable to procedure in the Courts, yet the considerations which gave rise to those rules are pertinent in all matters involving the exercise of the judicial faculty. The present case illustrates this principle. In passing on the soundness of the Commission's decision, the manner in which the decision was finally arrived at is significant.

There is but one principal question to which we desire to direct the attention of the Court in this appeal, and but one principal point on which we rely in asking this Court to reverse the decree of the District Court, and to annul the order of the Commission:—

Is a Violation of the Interstate Commerce Act Presented by the Facts Found by the Commission?

Our position, which we assert with the greatest confidence, is that the Commission's opinion and order is on its face erroneous, as a matter of law.

The Court is not asked to modify any finding of fact by the Commission, actual or inferential, but merely to correct, as it has frequently done, an error by the Commission in the construction of the Act which it was organized to administer.

Our position may be concisely stated as follows:—

All the rates charged by or participated in by an interstate carrier being per se reasonable and non-discriminatory in their relation to one another, no violation of the Act can be predicated on such carrier's refusal to adjust its rates to any given destination in accordance with subnormal rates established by other independent carriers, in the fixing of which it has no voice.

Under the findings of the Commission, as summarized in the opinion of the Court below, the Reading's rate of $1.35 from Evansville to Jersey City is in and of itself reasonable.

It is also reasonable as compared to the Reading's rates of $1.65 to Baltimore, $1.20 to Philadelphia, $1.40 to New York, $2.25 to New England, and for that matter is reasonable and proper in its relation to all other rates fixed by the Reading or in which it participates.

The only alleged impropriety of the $1.35 rate on which the Commission relies in ordering its discontinuance, is in its relation to the rate of 80 cents charged by independent carriers from points of production not reached by the Reading.

As to this 80-cent rate the Commission finds in its original report (Record, page 16):—

> "* * * It is true that the Philadelphia and Reading does not have any hand in the establishment of the 80-cent rate from these other mills * * *."

Again in its supplemental report it finds even more specifically (Record, page 19):—

> "The Philadelphia and Reading does not participate in the 80-cent rate from any mill in the district."

The Commission thus finds that the Reading had no hand in the establishment of, and did not participate in, the only rate the exaction of which produced the alleged discrimination.

This brings directly before this Court the question of law which it must answer affirmatively in order to sustain the lower Court and the Commission.

Because the Reading charges or participates in the same rates as its competitors to some points, is it thereby obliged to meet any rates which such carriers may choose to put in effect to other points?

Because the Reading charges from Evansville the same rate that the Lehigh Valley charges from Cementon to Baltimore, Philadelphia, New York and New England, is the Reading thereby bound to regulate its charge to Jersey City to whatever rate the Lehigh Valley may see fit to put in effect?

If this be the law, then indeed the rates of any carrier are no longer in its control, but are at the mercy of its competitors.

If the Reading is bound to haul cement from Evansville to Jersey City at a rate but a little more than half its admittedly proper rate to New York, simply because the Lehigh and New England and Lehigh Valley choose to do this, why will not the same duty apply if the latter roads choose to reduce their Jersey City rate to 25 or 10 cents?

In the present case, as found by the Commission (Record, page 14), there are six different routes from the Lehigh Cement district, exclusive of that from Evansville by the Reading. As it here happens, all these other carriers agree on the 80-cent rate. But suppose they did not. If the rate of one were $1.25, by another $1.00, by a third 90 cents, by a fourth 80 cents, by a fifth 60 cents, and by the sixth 50 cents, which rate would the Reading be bound to follow?

In the ordinary case in which the Commission orders a discrimination removed, the carrier may correct the situation in two ways, either by reducing the rate to the complaining locality or by raising that to the favored point. In the present case, however, the Reading has but one alternative. It cannot raise the 80-cent rate from the "other points," since it does not serve them. It can comply with the order only by reducing its $1.35 rate to 80 cents, and it must keep on doing this as long as the other lines reduce the 80-cent rate lower. Indeed, since two roads having the 80-cent—Lehigh Valley and Lehigh and New England—were not parties to the record before the Commission, the order practically amounts to a requirement that the rate be maintained at 80 cents by all the defendants.

The Opinion of the District Court.

The fundamental error at the basis of the ruling of the Court below originates in its point of view—it fails to appreciate who it is that is really responsible for the rate situation at Jersey City which it regards as anomalous.

Both the Commission and the Court seem to consider that the Reading has singled out Jersey City as an object of undue discrimination, when what has really happened is that the other carriers have selected Jersey City as an object of special preference.

The rate by the Reading to New York is $1.40, an admittedly reasonable and proper rate; its rate to Jersey City is $1.35, a rate admittedly reasonable in and of itself and also obviously so in its relation to the rate to New York.

The rate by the other lines to New York is $1.40, the same as that by the Reading, but their rate to Jersey City is but 80 cents, a rate so low that it permits New York dealers to evade the New York rate by the unusual and uneconomical method of shipping to Jersey City, and from there trucking to New York. Yet the complaint here is that the Reading does not also fix a Jersey City rate which will permit the similar evasion of its own proper rate to New York.

The manner in which the District Court fell into the crucial error which prompted the dismissal of the Bill cannot be more forcibly shown than by a reference to the Court's opinion, in the light of the foregoing considerations.

The Court begins its discussion of the present question as follows (Record, pages 53-54):—

> "*Second.*—The remaining question presented from the viewpoint of the defendant, briefly stated, is whether the Commission in finding discrimination, is restricted to discriminatory rates fixed by a carrier between different points upon its own line, or whether the Commission has power to find discrimination against a locality, because a carrier, serving that

locality, does not conform its rates to lesser rates fixed by competing carriers. We do not think that this case presents in the abstract the question thus suggested by the defendant; nor do we think the Commission compelled the defendant carrier to adjust its rate because independent carriers charged lesser rates."

"At first view it would appear that the defendant carrier established a rate from one locality to another on its own line, and that other carriers established on their lines lesser rates between the same localities, and for that reason the defendant was coerced to lower its rate, with the result that its rate was not fixed by itself but was fixed by its competitors. That is not the reason which underlies the order of the Commission. The reason for the Commission's order exists in the fact that joint rates on cement from the Lehigh District to points of distribution east and south had been made by all the carriers serving the different mills in that district. In this joint tariff the Reading Company uniformly and consistently participated, except in the rate to Jersey City. Even in that rate the Reading Company participated when the cement delivered for carriage was destined for transshipment to coastwise ports, but for cement intended for local consumption it made an exception and fixed a rate from Evansville to Jersey City, that excluded the Evansville cement from the Jersey City market. The act of excepting Jersey City from the advantages of traffic rates, which in participation with other carriers it accorded other localities, was the act of the Reading Company, and not the act of its competitors. The act of withdrawing from Jersey City the right it afforded all other localities on relatively the same terms to procure the transportation of Evansville cement, was the act of the Reading Company and not of its competing carriers. The act which in

effect prohibited the sale of Evansville cement in the Jersey City market resorting for cement to the Evansville locality, thereby stopping commerce in that commodity between the two localities, was the act not of its competitors but of the Reading Company itself.

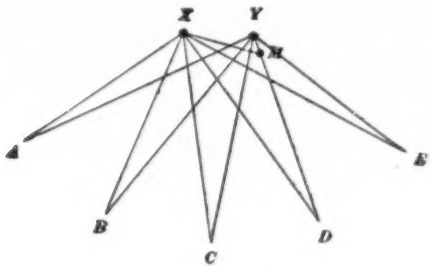
From these acts of the Reading Company, which were all acts of its own and by which Jersey City was singled out as the one locality to be excepted from the advantages of relatively equal rates accorded all other localities of cement distribution, the Commission found that the Reading Company had discriminated against Jersey City, and accordingly ordered it to cease and desist from maintaining a rate that produced such a prejudice and discrimination."

The Reading Company has not refused to join in a joint tariff to Jersey City. On the other hand it has joined in such a tariff at a through rate which is reasonable and proper in its relation to the other rates in which the Reading participates to other eastern points. It joins in a joint rate to Baltimore, a distance of 160 miles, of $1.65; to Philadelphia, a distance of 69 miles, of $1.20; to New York, a distance of 136 miles, of $1.40; and to Jersey City, one mile less distant, a rate of $1.35. The other carriers fix the same rates to Baltimore, Philadelphia and New York, but make their rate to Jersey City 60 cents less than that to New York.

Does this, we ask the Court, point to a "singling out" by the Reading of Jersey City as an object of unjust discrimination? We submit that it shows conclusively the selection by the other carriers of Jersey City as an object of special preference over New York.

It was not the Reading which withdrew from Jersey City a right which it was entitled to demand, but the other carriers who have gratuitously accorded Jersey City an advantage to which, if New York complained, it might be the duty of the Commission to put a stop.

If we test the principle at the basis of the Commission's ruling by a simple example its unsoundness becomes doubly apparent.



In the diagram above let us suppose that X represents a shipping point situated on the line of the X Railroad, and Y a shipping point on the Y Railroad. Both roads serve the various points of delivery, A, B, C, D and E, neither touching but one of the shipping points X and Y. The rates by each road to points A, B, D and E are the same, say $1.00, all these rates being reasonable *per se*, and relatively reasonable compared to one another. To the point C, however, the Y Railroad puts in effect a rate of 50 cents. Must the X road immediately follow and reduce its rate to 50 cents? If it does, and the Y road thereafter reduces its rates to C to 25 cents, must the X road again follow? And must it keep on reducing the rate to 10 cents to meet the rate of the Y road if the Y road, in order to drive the X road into bankruptcy, should establish the absurd rate of 10 cents?

Yet the buyer at C might contend that unless it were required to do this he was unduly prejudiced, because the X road met the rates of the Y road at A, B, D and E, but not at C. He might say, just as the Commission did in the present case, that the X road was "party to tariffs under which cement might be purchased as cheaply at X as at Y by dealers at all the points of destination with the single exception of C."

The answer, however, would be that the standard which the Act requires the X road to adhere to in refraining from discrimination is not the standard set by its competitors, but the standard set by itself. Any other rule would make the rates of a railroad subject not to its own direction, but to the whims of its competitors.

Furthermore, if the Commission's rule be true as to C, why would it not also hold to a point M, very near to Y and much more distant from X?

Can a citizen of Reading, 10 miles distant by the Reading from Evansville, demand the same rate by the necessarily roundabout route via the Lehigh Valley from Cementon, as the Reading allows by its straight haul over its line?

The above illustration presents in a simpler form the exact question involved in the present case. X represents the Reading and Y the other competing lines. The points A, B, D and E represent respectively Baltimore, Philadelphia, New York and New England. C is Jersey City. Instead of being points averaging an equal distance from X and Y, and taking (except C) the same rate, the points are at varying distances, and take rates varying in proportion to such distances.

All these rates—$1.65 to Baltimore, $1.20 to Philadelphia, $1.40 to New York, $2.25 to interior New England points, $1.85 to New England tidewater ports—are sufficiently high to warrant the Reading in participating in them. It does not choose, however, to join in a local rate to Jersey City of but 80 cents. The $1.35 rate to Jersey City is already lower, by reason of water competition, than that to intermediate points. It is a reasonable rate. By refusing to sustain the Cement Company's contention to the contrary the Commission has so found. If the other lines can thus force the Reading's rate down to 80 cents, where is this process to end? Why cannot one of the lines come down to 60 cents, another to 50 cents, another, favorably situated, perhaps, to 40 cents, and so on?

The foregoing considerations bring out clearly how disastrous to the Reading, or to any other railroad, it may be if this Court should sustain the revolutionary doctrine involved in the Commission's order and upheld by the District Court. Under the Interstate Commerce Act the Reading cannot refuse to participate in moving cement to Jersey City. If the Lehigh Valley, which has its own direct and shorter line to the Lehigh Cement District, chooses to put in force a ruinously low rate to Jersey City, the Reading, under the Commission's ruling, must either meet this rate, or else abandon competition with the Lehigh Valley at all points common to both roads, even where reasonable rates are in force, thus subjecting itself to just complaints from shippers at all such points.

If the Commission's ruling holds good, a rich road or one operated for speculative purposes will have at its command a ready means of driving all its poorer competitors into bankruptcy.

The mere statement of the logical results of the Commission's fallacious interpretation of the Act is its own best refutation.

Another circumstance, heretofore alluded to, illustrates still further the difficulty incident to sustaining the Commission's order.

The Commission refers to the fact that the rate by all lines to New York is $1.40 and mentions the advantage that shippers from the "other mills" have in being able to ship by the 80-cent local rate to Jersey City, there unload, and transport their cement across the river **by trucks** to New York **at a cheaper aggregate charge than they would incur by paying the regular New York rate.** Is it not patent that, the New York rate being a reasonable one, any rate to a contiguous competitive point which makes possible such an evasion of the tariff, must of itself operate to the manifest disadvantage of shippers who use the regular New York rate? This circumstance of itself is a conclusive demonstration that the 80-cent local rate to Jersey City is a sub-normal rate,

is out of all proportion to the rates to the other points mentioned, and is one which, if enforced against the Reading, might readily give rise to claims of undue preference on the part of the other cities named.

If the Commission had found that the $1.35 rate was discriminatory compared to the Reading's $1.65 rate to Baltimore, its $1.20 rate to Philadelphia, its $1.40 rate to New York, its $2.25 rate to Springfield or its $1.85 rate to Providence, then there might be strong ground for contention that the Commission's finding was conclusive on this Court even though as a matter of fact it were incorrect.

The Commission, however, made no such finding. The relation of the Reading's $1.35 rate to all its other rates to the other points of destination named are just and reasonable.

A glance at the rates themselves shows conclusively why the Commission did not feel itself justified in condemning the $1.35 rate on this ground. They are on their face entirely proper in their relation to one another.

If the Commission considered the $1.35 rate to Jersey City unreasonable, it was a simple matter for the Commission so to find.

It did not.

If the Reading's rate to New York had been 80 cents, its rate to Philadelphia, 50 cents, that to Baltimore, $1.00, and that to New England, $1.05, then indeed Jersey City might have had some ground for claiming an 80-cent local rate to Jersey City.

But merely because the other lines, for reasons of their own, chose to put in force this exceptional and sub-normal rate, is no reason whatever, under the law, for requiring the Reading to follow them.

Although no case involving a state of facts precisely similar to the case at bar has ever come before this Court for dicision, the controlling principle involved in our present contention has been made the basis for a

line of leading decisions. These are the cases arising under Section 4 of the Act as it stood prior to the 1910 Amendment, holding that it was not a violation of the Long and Short Haul Clause, nor an undue preference under Section 3, for a carrier to charge a less rate for a longer haul where the long haul rate was forced down by competition. The principle controlling these decisions is that when a carrier in fixing its rates has given proper consideration to circumstances within its control, it is not obliged to alter its otherwise reasonable rates by reason of circumstances beyond its power to regulate.

This principle is nowhere stated more concisely or forcibly than by the present Chief Justice in the leading case of East Tennessee V. & G. R. Co. *vs.* I. C. C., 181 U. S. 1, 18:—

> "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination and undue preference **arising from the voluntary and wrongful act of the carriers complained of** as having given undue preference, **and does not relate to acts the result of conditions wholly beyond the control of such carriers."**

The application of the foregoing rule to the case at bar is obvious.

The Act requires that the rates which the Reading maintains on its own line and in which it participates in connection with other carriers shall be just and reasonable.

It further requires that these rates shall bear a reasonable relation to one another.

It does not, however, require that the rates which the Reading has a voice in fixing must adhere to a standard wholly beyond its control.

The Commission was created to enforce the provisions of the Act and its powers are confined to the exercise of this duty. It has not, as the opinion of the District Court would seem to infer, any general power to oversee

the rates of common carriers or to look after the welfare of the communities served by them. If a given rate or practice does not violate the Act the Commission has no power to forbid or to alter it.

Under the Commission's findings, the $1.35 rate is not unreasonable of itself, nor is it unreasonable or discriminatory compared to the Reading's other rates from Evansville to Baltimore, Philadelphia, New York, New England, or any other points of destination.

If we compare the Jersey City rates by the several lines with the $1.40 rate by all lines to New York, it is apparent that far from being unduly prejudiced, the Jersey City dealer really has a great advantage.

Under the Commission's ruling the Reading's $1.35 rate to Jersey City is not discriminatory in its relation to the Reading's other rates to the other points named. If the rate by the other lines to Jersey City for local consumption were $1.35 there would be no ground for the order of the Commission.

If, then, Jersey City would have no valid cause of complaint if the rate by all lines were $1.35, how can she base any complaint on the fact that by some of the roads she is given a rate of but 80 cents?

Clearly by this circumstance Jersey City is that much better off. She is fortunate that the dealers in lower New York do not complain that the 80-cent rate, which enables her merchants to deliver cement in New York by trucks cheaper than the New York dealers can get it there by rail, effects an undue preference in favor of Jersey City and against New York.

The relation between the rates charged by the Reading to Jersey City and to other points served by it is not held to effect an undue preference. Any disadvantage either to Evansville or to Jersey City results wholly from the existence of the 80-cent rate put in effect by other lines over which the Reading has no control whatever.

Under the rule laid down by this Court, above quoted, this circumstance, we maintain, is conclusive of the invalidity of the Commission's order.

Although not, of course, binding in this Court as a precedent, it may be of interest to note that the District Court for the Eastern District of Illinois has decided the essential question here involved in favor of the appellants' present position, holding that, as a matter of law, an order of the Commission is unlawful which is predicated on a charge of discrimination by locality against a railroad which does not serve both the locality alleged to be preferred and that alleged to be prejudiced by the regulation complained of.

St. Louis I. M. & S. R. Co. *vs.* U. S., 217 Fed. 80.

The foregoing considerations dispose, it is submitted, of the real and vital question in this case.

Certain subsidiary questions, however, have been alluded to by the parties in the course of this litigation which require notice.

In the Court below counsel for the Commission laid great stress on the fact that on cement shipped to Jersey City for transshipment by vessel to southeastern ports, the Reading fixed an 80-cent rate from Evansville.

For the purpose of the present appeal it would be sufficient to refer again, as we did in the statement of the case, to the fact that the Commission did not, either in its report or in its order, rely on this as constituting a discrimination against Jersey City in favor of the southern ports. As an alleged ground for relief it is entirely distinct from that which the Commission made the basis for its order, and the Commission not having found that it constituted a violation of the Act, this Court will not do so.

In any event, the exaction of inland rates on shipments for transshipment by water lower than the local rates for domestic consumption has so frequently been sustained by this Court as to require but little comment.

The leading case in this connection is **Texas & Pac. R. Co. vs. I. C. C., 162 U. S. 197,** decided in 1896, the authority of which has never been questioned.

The point at issue in that case was the legality, under Section 3, of rail rates inland from United States ports of entry. On freight which had come by steamships from foreign ports, these rates were very much less than the rates on the same freight originating locally and shipped to the same destinations. In the opinion of the Commission on which the order before this Court was based, it appears that the import rates averaged less than 50 per cent. of the local rates and in many instances were very much less than 50 per cent. Thus the inland rail rate from Philadelphia to Chicago on tin plate coming from Liverpool was 12 cents per 100 pounds while on the same article originating at Philadelphia the rate for the identical service was 28 cents; on boots and shoes, cigars, groceries and drygoods from New Orleans to San Francisco the import rate was $1.07 while the local rate was $3.70 to $3.74, &c. (See 4 I. C. C. Rep. 466.)

The carrier contended that the low import rate was compelled by the competition of the other railroads in conjunction with the steamship lines and that the preference created in favor of the foreign shipper by the disparity of charge for the same service was not therefore undue. The Commission, however, refused to accept this construction of the Act, holding that "imported traffic transported to a place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights."

This Court refused to enforce the foregoing order, holding that the fact that the freight had come by water to the port of entry from a competitive point of origin was a circumstance sufficient to justify an inland import rate lower than the regular local charge. The same rule has been held applicable to goods for export.

The 80-cent transshipment rate is really a part of a competitive through charge from the cement district to the southeastern points, and is not a proper standard for determining the reasonableness of the local rate to Jersey City.

The law does not make *per se* unlawful the exaction of a transshipment rate lower than the rate for domestic consumption and the Commission has not found that in this case it effects an undue discrimination.

SUMMARY.

The complaint before the Commission in pursuance of which the Commission made the present order alleged that the Reading's $1.35 rate to Jersey City was unreasonable and effected an undue discrimination against the Cement Company and Evansville, where its plant was located.

The Commission did not sustain either of these allegations. It did not find that the $1.35 rate was unreasonable. It found that the disadvantage under which the Cement Company and Evansville labored was not caused by the Reading since it did not participate in the fixing of the rate which caused it.

In the course of the hearing of this issue, the Commission found, without any complaint by Jersey City, that the latter place was unduly discriminated against, the basis for its finding being the fact that while the Reading charged the same rates as the other lines from the Lehigh cement district to Baltimore, Philadelphia, New York and New England, it refused to meet their 80-cent rate to Jersey City.

A comparison of the respective rates of $1.35 and 80 cents to the admittedly proper rate of $1.40 New York fixed by all the lines, is a sufficient demonstration that any disparity in the rate situation is the creation not of the Reading but of the other carriers.

The cardinal error by the Commission and by the Court below resulted from its failure to place this responsibility where it belonged. It required the Reading to remedy a situation for which it was in no way responsible.

Under the Commission's findings, the $1.35 rate was not unreasonable of itself, nor was it unreasonable or discriminatory compared to the Reading's other rates from Evansville to Baltimore, Philadelphia, New York, New England or any other points of destination.

If the rate by all lines from the Lehigh District to Jersey City were $1.35, under the Commission's findings, there would be no violation of the Act.

But so far as the Reading is concerned, the rate is $1.35. It is the other lines and not the Reading which have reduced the rate to 80 cents and thus created the situation complained of.

How, then, by any possibility can a violation of law by the Reading be based on something which the Reading did not do, and over which it had no control whatever?

If the rate by all lines to Jersey City were $1.35, then under the Commission's findings, Jersey City would have no valid cause of complaint. In that case there would be no discrimination against Jersey City by any of the roads; she would be as well off as she had a right to be.

How then, can Jersey City predicate an undue discrimination by the Reading against her on the fact that by the other roads she is given a better rate?

Obviously, if any locality has a cause of complaint, it is not Jersey City, but New York. Obviously, too, such complaint should be directed by the New York merchant not against the Reading, but against the other lines, who by reducing the Jersey City rate to 80 cents, have enabled the Jersey City merchant to undersell him at his own terminal.

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CHARLES HEEBNER,
ABRAHAM M. BEITLER,
Of Counsel

No. 440.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

PHILADELPHIA AND READING RAILWAY COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA (INTERSTATE COMMERCE COMMISSION AND ALLENTOWN PORTLAND CEMENT COMPANY, INTERVENING RESPONDENTS), APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1915

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

PHILADELPHIA & READING RAILWAY COMPANY, appellant,
v.
THE UNITED STATES OF AMERICA (INTERSTATE COMMERCE COMMISSION and ALLENTOWN PORTLAND CEMENT COMPANY, intervening respondents), appellees. } No. 440.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a suit, brought by the Philadelphia & Reading Railway Company in the District Court of the United States for the Eastern District of Pennsylvania, to enjoin the enforcement of an order of the Interstate Commerce Commission. The case was submitted on bill and answer, and, upon final hearing, an order was entered denying the injunction and dismissing the bill. (Record, pp. 46, 56; 219 Fed., 988.)

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The case is here upon the appeal of the Philadelphia & Reading Railway Company.

STATEMENT OF FACTS.

The Allentown Portland Cement Company, a cement manufacturing establishment located at Evansville, Pennsylvania, filed with the Interstate Commerce Commission a complaint (Rec., p. 10) against appellant and other carriers alleging that certain of their rates on cement from Evansville to Jersey City and vicinity discriminated "against complainant and the locality in which its plant is located." (Rec., p. 12.) The Commission did not expressly find the existence of discrimination against the Allentown Portland Cement Company or Evansville but did find that in maintaining or participating in the rates in question the carriers were "subjecting Jersey City and its traffic to an undue prejudice and disadvantage" (Rec., p. 16) and entered an order requiring them to cease and desist from said discrimination. (Rec., p. 17.) Jersey City was not a party to the proceeding nor did the complaint contain a prayer for relief on its behalf. The Philadelphia & Reading filed a petition, not set out in the record, asking for a rehearing of the case, which was granted, and "additional testimony therein taken." (Rec., p. 6.) Upon the rehearing the original findings were approved in an additional report (Rec., p. 19) and a second order entered substantially the same as the first (Rec., p. 23).

In the proceedings before the Commission "all the matters, things, and controversies set forth in said complaint and all the facts, circumstances, and conditions affecting and bearing upon the questions at issue in said cause before this defendant (the Commission) in which the order in controversy was entered, were presented to and were duly considered by this defendant in said proceeding before it." (Rec., p. 29.)

The plant of the Allentown Portland Cement Company is located in the cement region in Pennsylvania known as the "Lehigh District." Appellant, the only carrier whose line reaches this plant (Rec., p. 13), transports the cement from Evansville to Allentown, where it is delivered to one of several connections for transportation to Jersey City (Rec., p. 19). Located elsewhere in the Lehigh District, within a radius of perhaps 20 miles, are many other cement plants, served by the Central Railroad of New Jersey or Lehigh Valley, or by short lines connecting with them, but not reached by appellant's lines. (Rec., p. 14.)

The Lehigh district is treated by all the carriers serving mills therein as a locality and all, including appellant, participate in making and maintaining the same relative rates for transporting cement from mills variously situated in this district to practically all points of importance east and south, except that appellant withholds this relative rate upon cement from Evansville destined to Jersey City for local con-

sumption, though all the while a party to tariffs under which cement from Evansville enjoys such relative rate if destined to Jersey City for transshipment by water to points in the southeast, such as Charleston and Savannah, or if destined to Philadelphia, Baltimore, New York City, and New England points. (Rec. p. 14.) "In other words, the rate is the same from Evansville as from the other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption." (Rec., p. 15.)

The rate on cement from all mills in this district to Jersey City is 80 cents per ton, whether for local consumption or transshipment, except only appellant's rate on cement from Evansville for local consumption in Jersey City, which is $1.35 per ton. Appellant's 80-cent rate upon cement destined to Jersey City for transshipment, the rate maintained by all the carriers, is not "a proportional of any joint rate, but a relative rate upon traffic going beyond Jersey City." (Rec., p. 27.)

ARGUMENT.

In the opinion rendered in this case the district court dealt with two questions, one of procedure, the other involving the merits of the case.

I.

JERSEY CITY NOT A NECESSARY PARTY.

The complaint before the commission alleged discrimination against the Allentown Portland Cement Co. and the town of Evansville, but not against

Jersey City. The commission found the existence of discrimination against Jersey City. The District Court held that inasmuch as appellant was afforded "an opportunity to defend, and did defend, on a rehearing, against the charge of discrimination against Jersey City" (Rec., p. 52), and did not then object to the scope of the inquiry, the commission's order would not be enjoined for failure to comply with the strict rules of pleading which prevail at common law.

This ruling is supported by authority. (*Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, 44; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S., 88; *N. Y. C. & H. R. R. Co.* v. *Interstate Commerce Commission*, 168 Fed., 131, 138.)

Since appellant no longer insists upon this contention (Brief, pp. 8, 9), it will be passed without argument.

II.

THE PRACTICE COMPLAINED OF SUBJECTED JERSEY CITY TO UNDUE AND UNREASONABLE PREJUDICE AND DISADVANTAGE.

The act to regulate commerce provides:

> SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particu-

> lar description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

This provision forbids discrimination of any kind whatsoever.

> It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (*Houston & Texas Ry. Co.* v. *United States*, 234 U. S., 342, 356. *Sou. Ry. Co.* v. *United States*, 204 Fed., 465; *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.*, 118 Fed., 613.)

It is within the power of the Commission to protect the consuming point from discrimination as well as the locality where the traffic originates.

> When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question. (*Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 184, 220.)

What is undue or unreasonable preference or advantage is a question not of law but of fact. (*Penn-*

sylvania Co. v. *United States*, 236 U. S., 351, 361; *Texas & Pacific Ry. Co.* v. *United States*, 162 U. S., 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S., 144, 170.)

The determination of this question of fact is for the Commission, and its findings are conclusive.

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*, 215 U. S., 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S., 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S., 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn., etc., Ry. Co.* v. *Interstate Com. Com.*, 181 U. S., 1, 23–29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legis-

> lative purpose and the inevitable conflict which exists between giving the purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise, since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action. (*United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S., 314, 320.)

This case having been submitted on bill and answer, the preferences and discrimination alleged in the answer of the Commission must be taken as true. (*Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S., 452, 475; *Interstate Commerce Commission* v. *Chicago & Alton R. Co.*, 215 U. S., 479; *Interstate Commerce Commission* v. *Chicago, R. I. & Pac. R. Co.*, 218 U. S., 88.)

The facts alleged in the bill and answer, stated in the words of the District Court, show:

> * * * That joint rates on cement from the Lehigh district to points of distribution east and south had been made by all the carriers serving the different mills in that district. In this joint tariff the Reading Company uniformly and consistently participated, excepting in the rate to Jersey City. Even in that rate the Reading Company participated when the cement delivered for carriage was destined for transshipment to coastwise ports, but for cement intended for local consumption it made an exception, and fixed a rate from

> Evansville to Jersey City that excluded the Evansville cement from the Jersey City market. The act of excepting Jersey City from the advantages of traffic rates, which in participation with other carriers it accorded other localities, was the act of the Reading Company and not the act of its competitors. The act of withdrawing from Jersey City the right it afforded all other localities on relatively the same terms to procure the transportation of Evansville cement was the act of the Reading Company and not of its competing carriers. The act which in effect prohibited the sale of Evansville cement in the Jersey City market and conversely prohibited the Jersey City market resorting for cement to the Evansville locality, thereby stopping commerce in that commodity between the two localities, was the act not of its competitors but of the Reading Company itself. (Rec., p. 54.)

Appellant having voluntarily, in its traffic agreements with the other carriers, established the same relative rates from all points in the Lehigh district to consuming points other than Jersey City, can not, if conditions are the same, arbitrarily decline to make the same arrangement with respect to Jersey City.

> Carriers may, for the purpose of meeting water competition, make rates lower than would otherwise be justifiable, even to the extent of charging a less rate to the more distant point. It is also true that the carrier may determine for itself whether it will or

> or will not meet such water competition. While, however, the carrier may in the first instance settle its policy in this respect it must act under certain limitations. *It can not be permitted to compete at one point and decline to compete at another, where all conditions are the same; nor should it, ordinarily, be allowed to compete one day and decline to compete the next. The public has the right to acquire equal and uniform treatment within the bounds of reason.* (*Darling & Co.* v. *Baltimore & Ohio R. R. Co.*, 15 I. C. C., 79, 87; *City of Spokane* v. *Northern Pac. Ry. Co.* (Intermountain Rate case), 21 I. C. C., 400, 424.) [Italics ours.]

The Commission, after consideration of evidence not set out in the record but adduced at the hearing before it, found, it must be presumed, that conditions existing at Jersey City were not so different from those existing at other consuming points (Washington, Baltimore, Philadelphia, etc.) as to justify different treatment, and expressly said that it had not been shown by the record "why Jersey City should be singled out by that carrier (appellant) as the one exception to this equalization of rates as between competing mills in the same district." There is nothing in the record to show the absence of substantial evidence supporting these findings of fact, so they are "conclusively correct in case of judicial review." (*United States* v. *Louisville & Nashville R. R. Co., supra.*)

It is submitted that Congress did not intend to exempt such discriminations from the operation of

the act and that to so hold would leave the Commission powerless to afford relief against many unjust discriminations and would not give full effect to the prohibition against "any undue or unreasonable prejudice or disadvantage in any respect whatever."

CONCLUSION.

The judgment of the District Court should be affirmed.

E. MARVIN UNDERWOOD,
Assistant Attorney General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
OCTOBER, 1915.

○

No. 440.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

PHILADELPHIA & READING RAILWAY COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ALLENTOWN PORTLAND CEMENT COMPANY, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel for the Interstate Commerce Commission.

SYNOPSIS AND INDEX.

TABLE OF CASES.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the District Court of the United States for the Eastern District of Pennsylvania, dismissing a bill in equity filed by the appellant to enjoin and set aside an order of the Interstate Commerce Commission. The case was heard by Circuit Judges Hunt and Wooley and District Judge Dickinson. The District Court's opinion is in the printed record, beginning at page 46.

Proceedings before the Commission.—On the 15th of November, 1912, the Allentown Portland Cement Co., a corporation organized and existing under the laws of New Jersey, filed a petition before the Commission complaining that the Philadelphia & Reading Railway Co., The Central Railroad Co. of New Jersey, The Delaware, Lackawanna & Western Railroad Co., Erie Railroad Co., and The Pennsylvania Railroad Co. were charging the complainant unjust, unreasonable, and discriminatory rates from its cement mill located at Evansville, Pa., to points within the so-called Metropolitan district in New Jersey. The discrimination charged in the complaint was "against the complainant and the locality in which its plant is located and in violation of section 1 and section 3, respectively, of the act to regulate commerce." The complainant prayed for an order declaring (1) "the rates aforesaid to be unjust and unreasonable," and (2) "that the same discriminate against complainant and the locality wherein is located its plant or factory aforesaid. The defendant companies were duly notified and appeared. Due hearing was had, and the case was decided June 18, 1913, 27 I. C. C. 448, printed record, page 13. The Commission's report and the order directed to be entered therein found as to all the defendants that—

> * * * in maintaining to Baltimore, Md., New York, N. Y., points in New England, and various other eastern destinations, including Jersey City, N. J., on traffic for beyond to the

> southeast, rates on cement in carloads which are not higher from Evansville, in the so-called Lehigh district in Pennsylvania, than their rates contemporaneously charged on similar traffic from Nazareth, Bath, Atlas, Ormond, Northampton, and Copley, also in the said district, while refusing to establish and maintain the same relative adjustment of rates as between Evansville and said other mills on cement shipped to Jersey City, N. J., for local consumption, defendants are subjecting the city of Jersey City, N. J., and its traffic to undue and unreasonable prejudices and disadvantages.

The defendants were ordered—

> * * * to cease and desist from said undue and unreasonable prejudices and disadvantages.

And—

> * * * to establish, on or before September 15, 1913, upon statutory notice * * * and for a period of two years * * * to maintain and apply to said transportation rates which will prevent and avoid the aforesaid undue and unreasonable prejudices and disadvantages.

Application was made for a rehearing on the ground, among others, that the decision of the Commission did not follow the prayer of the complaint in that the discrimination found was against the *consuming* locality and not the *producing* point. A rehearing was granted and the original order vacated.

The application for the rehearing was made, the Commission states—

> * * * on behalf of defendants by the Philadelphia & Reading Railway Company, which carrier has from the beginning assumed the burden of defense.

Additional testimony was taken and the case having been resubmitted was decided by the Commission July 10, 1914, 31 I. C. C. 277, printed record, page 19. The original findings were affirmed and the order again entered. Printed record, pages 22, 23, and 24.

The reasonableness of the rates complained of was not determined. The sole ground of the order was the refusal of the defendants "to establish and maintain the *same relative adjustment of rates*" between Evansville and the other mills in the Lehigh District on cement shipped to Jersey City, N. J., for local consumption as was maintained in the rates "to Baltimore, Md., New York, N. Y., points in New England, and various other eastern destinations," including Jersey City for beyond by water.

The record of evidence taken before the Commission was not presented to the District Court, and therefore the question whether there was substantial evidence to support the findings is not involved in this case.

The order was entered after a rehearing and the facts are stated in the original and supplemental reports of the Commission. Printed record, pages 13–18 and 19–22. The order is found on pages 23 and 24. *The order has been complied with.*

QUESTIONS INVOLVED.

The questions of law involved in this case are stated in the opinion of the District Court, at page 48, as follows:

> First. (*a*) Whether the Commission has power to make a finding of discrimination against a locality when that locality or one of its citizens is not a complainant;
>
> (*b*) Whether under the pleadings the Commission has power to find discrimination against a locality not therein specially designated as the locality discriminated against; and
>
> Second. Whether undue discrimination against a locality, as contemplated by the statute, is restricted to discrimination in rates by a carrier between points exclusively upon its own line, entirely without regard to its effect upon commerce or the movement of traffic; or extends to a discrimination against a locality caused by a carrier fixing a rate from one point to another on its own line that is relatively different from rates which it and other carriers participate in making for competing points upon the lines of all of them.

The assignments of error are found on pages 58 and 59 of the printed record and call for a review of the decision of the District Court upon the questions above stated.

STATEMENT OF FACTS.

1. The term "Lehigh district," referred to in the record, is the designation of a cement-producing locality in Pennsylvania. There are "numerous

cement mills in that district located within a radius of perhaps 20 miles." These mills are served by various railroads as originating carriers, the traffic passing over several roads upon through routes and joint rates to consuming points. Evansville, where the Allentown Portland Cement Co.'s mill is located, is in this district and is served by the appellant *as an originating carrier*. It is not served directly by any other railroad. Four other carriers are parties to the through route and joint rates to the Metropolitan district and are parties to this order. See illustrative map at the conclusion of this brief.

2. There are many cities upon the Atlantic coast, such as Boston and other New England cities, New York, Philadelphia, and Baltimore, which consume large quantities of cement, and are also centers of trade, distributing points from which cement is sold and transported to hundreds of other consuming points reached by water or rail or both.

The "Metropolitan district," so called, includes points directly connected by ferries with New York City, such as Weehawken, Hoboken, Jersey City, and others. These places are reshipping points for traffic destined to Atlantic coast and river points; they supply cement to large portions of the city of New York, and are therefore important consuming and distributing points of cement and, as places of sale and distribution, they compete with other localities on the Atlantic coast, where the relative adjustment of rates is applied. The reasoning in this case applies to all the cities within the Metropolitan district, but the

Commission said in its report, "Jersey City * * * *will be taken as representative* for the purpose of this report." Printed record, pages 14, 21. The reports, order, and this brief, therefore, use Jersey City as a typical point in the Metropolitan district. Jersey City is a large distributing and consuming point for cement. By trucking it supplies a large part of the cement used south of Forty-third Street in New York, which is a great cement-consuming district.

3. The cement from the mills in the Lehigh district passes over through routes, upon joint rates, made by two or more railroads, to Jersey City. This is also true of routes and rates to the other large consuming points on the Atlantic coast. The appellant's railroad, as the originating carrier, serves exclusively the mill at Evansville, but its line does not extend to Jersey City. The cement from this mill is carried by the Philadelphia & Reading to Allentown and there turned over to the Central Railroad of New Jersey or Lehigh Valley Railroad for transportation to Jersey City. Through these connections and others the cement is carried to the other points in the Metropolitan district represented by Jersey City. The rates over these through routes from Evansville are made and participated in by the five defendants in the proceeding in which the order in controversy was entered, and the order runs against all of them.

4. The railroad companies, defendants in the proceedings before the Commission, join in the "relative adjustment of rates" from all mills in the

Lehigh district to the large Atlantic coast points outside of the Metropolitan district. They also join in such adjustment of the rates from all the mills in the Lehigh district to points in the Metropolitan district where the traffic is destined to points beyond *by water*. As to the traffic from the Evansvillle mill to the Metropolitan district, *which is for domestic use*, this advantageous adjustment is not observed. The rate from all the other mills in the Lehigh district to points in the Metropolitan district was 80 cents per ton, while from the Evansville mill the joint rate was $1.35 per ton. The relative adjustment of rates is, as stated, applied from the Evansville mill to Jersey City upon all traffic going *beyond by water*, the joint rate being 80 cents. The designation "for local consumption" or "for domestic use" includes cement used in Jersey City and that sold and delivered by trucks to consumers at contiguous points, especially New York.

5. The failure to apply the "relative adjustment of rates" to cement from Evansville to Jersey City for domestic use thus resulted in a disadvantage to the merchants and consumers in Jersey City of 55 cents per ton. The Commission found, as a conclusion of fact, that *the refusal of the defendants to give to Jersey City the benefit of the relative rate adjustment which was generally and contemporaneously applied to the cement traffic to competing cities and upon the traffic to Jersey City for points beyond reached by water* was subjecting Jersey City "and its traffic to undue and unreasonable prejudices and disadvantages."

ARGUMENT.

I.

THE COMMISSION IN MAKING ITS ORDER IS NOT LIMITED TO THE ISSUES RAISED IN THE COMPLAINT BEFORE IT.

This proposition was controverted by counsel for the appellant in the court below and is the first question decided by that court. Counsel for appellant in their brief (p. 8) in this court say:

> * * * we do not here contend that this Court should reverse the decree of the District Court and annul the order of the Commission merely because the Commission's order was in favor of Jersey City while the complaint came from Evansville * * *

In view of this attitude of counsel, we shall content ourselves with simply stating the proposition and the authorities in support thereof.

While not specifically granting the prayer of the complaint before it, the order condemns the unlawful acts complained of and which were disclosed by the complaint and investigation. Investigations may be instituted by complaints filed under section 13 of the act to regulate commerce. This section further provides—

> * * * the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which

> the inquiry is had excepting orders for the payment of money. *No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.*

Section 15, as amended, provides:

> That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, * * * (*either in extension of any pending complaint or without any complaint whatever*), the Commission shall be of opinion that any individual or joint rates * * * regulations or practices whatsoever of such carrier or carriers subject to the provisions of this act are * * * *unduly preferential or prejudicial* or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to * * * make an order that the carrier or carriers shall cease and desist from such violation *to the extent to which* the Commission finds the same to exist, * * *. [Italics ours.]

Following the substantive law in the act forbidding, among other things, undue discriminations and preferences, section 12 provides that "The Commission is hereby authorized and required *to execute and enforce the provisions of this act.*"

In *New York Central & H. R. R. Co. et al.* v. *Interstate Commerce Commission*, 168 Fed. 131, 138, 139, the Circuit Court of the United States for the Southern District of New York, speaking through Noyes, circuit judge, said:

> If this order were a judgment of a court, we should without hesitation say that the facts

alleged in the petition did not support it. The Interstate Commerce Commission is, however, an administrative tribunal dealing with practical problems. So long as parties affected by its orders appear and are fully heard, we think it would be most unfortunate to deny its power to grant such relief as the facts shown upon the investigation should call for, even though such facts might be presented by evidence technically outside the issues raised. * * * We conclude, therefore, that, while the order may have been technically outside the issues raised by the pleadings, it was still germane to the subject matter before the Commission and should not be declared invalid.

(See also *N. Y. & N. Ry. Co.* v. *N. Y. & N. E. Ry. Co.*, 50 Fed. 867; *I. C. C.* v. *D., G. H. & M. Ry. Co.*, 57 Fed. 1005; *T. & P. Ry. Co.* v. *I. C. C.*, 162 U. S. 197; *L. & N. R. R. Co.* v. *Behlmer*, 175 U. S. 648; *C., H. & D. Ry. Co.* v. *I. C. C.*, 206 U. S. 142; *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175, 197.)

This court, in *C., H. & D. Ry. Co.* v. *I. C. C.*, 206 U. S. 142, 149, 150, speaking through the present Chief Justice, said:

We think the Commission in making an investigation on the complaint filed by the Procter & Gamble Co. had the power, in the public interest, disembarrassed by any supposed admissions contained in the statement of complaint, to consider the whole subject and the operation of the new classification in the entire territory, as also how far its going into effect would be just and reasonable,

> would create preferences or engender discriminations; in other words, its conformity to the requirements of the act to regulate commerce. * * * And when at the threshold a question was raised in the examination of the same witness as to the competency of evidence on a subject not directly expressed in the complaint, but bearing upon the effect of the new classification, the commission declared it was competent to show the general effect of such classification in the territory through which it operated. Our assent to this view of the power of the Commission conclusively, of course, also disposes of the contention that the court was without authority to determine the validity of the order of the Commission by the scope of the act to regulate commerce, because of an admission asserted to exist in the complaint originally filed before the Commission.

The powers of the Commission are both administrative and *quasi judicial*, and in making its orders it must have in view the general provisions of the act to regulate commerce and the prevention of any evil which that act declares unlawful. This court, in *Interstate Commerce Commission* v. *Chi. R. I. & P. Ry.*, 218 U. S. 88, 103, speaking through Mr. Justice McKenna, said:

> The outlook of the Commission and its powers must be greater than the interests of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country.

The complaint before the Commission brought under consideration the different rates charged by the carriers upon cement from Evansville to Jersey City and other localities. The entire structure of these rates from all mills in the Lehigh district to Jersey City was the subject of investigation, discussion, and consideration, and it clearly appeared, the evidence being uncontradicted, that the only cement from this district to Jersey City which was charged a higher rate than 80 cents per ton was the cement from Evansville for local consumption at Jersey City.

The appellant herein has not been misled, nor has it labored under any misapprehension regarding the issue before this Commission. After the first order was entered declaring the discrimination against Jersey City to be unlawful, the Philadelphia & Reading filed a motion for rehearing. This was granted and the original order was vacated. Evidence was then presented upon the question of the adjustment of rates *to consuming points*. At this time the railroad company had before it not only the complaint of the cement company and the issues raised under that complaint, but was fully advised of the position taken by the Commission regarding the discriminating rates upon this traffic. The Philadelphia & Reading Railway Co. therefore had full and complete knowledge of the real issue in this case.

II.

THE PREJUDICES AND DISADVANTAGES CONDEMNED BY THE ORDER WERE UNLAWFUL.

The order finds, as already stated, that the refusal of the defendant carriers to make and maintain a relative adjustment of rates between Evansville and Jersey City while contemporaneously giving the advantage of relative rates on similar traffic from all mills in the Lehigh district to various destinations, including Baltimore, Md., and New York, N. Y., subjected Jersey City, N. J., and its traffic to "undue prejudices and disadvantages." The order then directs that the defendants, the five companies named, "cease and desist from said undue and unreasonable prejudices and disadvantages."

Brokers and jobbers in Jersey City handle cement from all the mills in the Lehigh district for consumption in New York City. The delivery of cement by the carriers on the New York rate is made by lighter to the harbor points on the east side of the river. From these points delivery to consumers is made by trucks. Considerable time and labor in loading and unloading is saved by delivery at Jersey City and other Metropolitan district points where the cement is loaded directly upon the trucks, carried by ferry across the river and delivered directly to the consumers in New York. The result is that a very large domestic trade has grown up in Jersey City. The refusal of the five carriers to maintain a relative adjustment of rates from Evans-

ville to these points in the Metropolitan district prevents consumers and merchants in Jersey City from handling the Evansville cement advantageously. The cement from all other mills is delivered at 80 cents per ton under the adjustment, while contemporaneously these five carriers charge $1.35 for Evansville cement, a clear disadvantage of 55 cents per ton upon this particular traffic.

The Commission did not pass upon the reasonableness of either rate. It struck at the discrimination and the cause of it. It said, in effect, to these five carriers that as they treated the Lehigh cement district as one point of origin and made a *relative adjustment of rates* on cement to all the principal consuming points competing with Jersey City, they must make the same adjustment of the rates to Jersey City on this commodity; that they might make the rate any sum which they might choose to initiate, but that it must be the same as the rate from every mill in the district to Jersey City.

While the points reached by water from Jersey City are open to Jersey City merchants by reason of the fact that the 80 cent rate on this traffic to Jersey City is preserved, Jersey City is deliberately discriminated against as to all its domestic business in Evansville cement.

Section 3 of the act to regulate commerce, among other things, provides:

> That it shall be unlawful for any common carrier subject to the provisions of this act

> to * * * subject any particular person, company, firm, corporation, *or locality*, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [Italics ours.]

In *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 220, this court, speaking through Mr. Justice Brewer, said:

> When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the commission is to regard only the welfare of the locality or community where the traffic originates or where the goods are shipped on the cars. *The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.* [Italics ours.]

Business or trade interests of a consuming locality include the business transacted by its citizens as brokers or jobbers in supplying contiguous territory, as well as in selling for purely local use. A discrimination in freight rates to a consuming locality impairs or destroys the business of its citizens engaged in that line of trade. If the carriers making the rate to that locality make a more favorable rate to a competing locality, they are prejudicing the former. Whether such prejudice is undue is a question of fact to be determined by the Commission. If, as to all other consuming localities, they are giving the relative adjustment of rates on cement from cement

mills in the Lehigh district, and refusing this adjustment to one consuming locality, they are prejudicing that locality. What one carrier may not do in making an individual rate it may not do as a member of a group of carriers making joint rates. The fact that they are acting jointly in producing such a prejudice or disadvantage does not excuse them. The statute applies with the same force as if each carrier were solely responsible for the conditions. Therefore when the Commission found that the entire group of carriers originating and participating in cement rates from the Lehigh district was making a relative adjustment of rates from all the mills to all principal points except Jersey City, it had the power and it was its duty to find that the carriers refusing to maintain this adjustment of the rates on the Evansville cement to Jersey City were unduly prejudicing Jersey City as a consuming locality.

The Philadelphia & Reading Railway Co. is the only one of the five carriers making these rates that is complaining. It is true that the appellant is the originating carrier at Evansville. As the originating carrier it undoubtedly receives a larger proportion of the joint through rate than its mileage bears to the entire mileage of the route, but it does not actually carry the traffic more than a third of the distance. Yet counsel for appellant speak as though the Philadelphia & Reading alone could fix this rate while it can not fix the rate from other mills. The rate is a joint rate. Appellant can not fix the

rate from Evansville to Jersey City; it has to cooperate with other carriers, just as other carriers cooperate with it to fix rates from other mills to other consuming points. The consent of all the carriers participating in the traffic is necessary to the establishment of any joint rate. One carrier has it in its power to refuse to join in a through joint rate from points where it is not an originating carrier unless its connections will in turn join with it in a joint rate from the point where it is the originating carrier. The carriers are interdependent in these matters and may and do agree upon such rates. There is no evidence that the connecting carriers from Evansville refuse to join in a relative adjustment of the rates from Evansville to Jersey City the same as is done in fixing the the rates from every other cement mill in the Lehigh district to Jersey City and other points. The appellant is no more "helpless" in the matter of joint rates than it would be if it were individually making the rate from every mill in that district. The order of the commission as to the five carriers requires them to cease and desist from this undue and unreasonable prejudice and disadvantage "*according as their various lines or routes may run.*" The other four carriers are not objecting to the order, and therefore show their willingness to comply with it and make this relative adjustment of the rates from Evansville to Jersey City.

III.

IT WAS WITHIN THE POWER OF THE COMMISSION TO CONDEMN THE PREJUDICES AND DISADVANTAGES AS UNLAWFUL.

The recognition of a producing district of low-grade traffic as a single point of origin and according rates to it as though it were a single point, giving a relative adjustment of rates from all the mills or mines within that district, is a very common usage among carriers. Section 15 of the act to regulate commerce, among other things, provides:

> That whenever, after full hearing * * * the Commission shall be of opinion that any individual or joint rates * * * regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are * * * unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe * * *.

The jurisdiction and power of the Commission extend to the prevention of undue prejudice caused by rates or practices of carriers. The statute has not defined what is undue prejudice or advantage; the determination of this question requires the exercise of judgment and discretion or, as the chancellor in an English case puts it, "of common sense", by "a tribunal appointed by law and informed by experience." *Ill. Cent. R. R.* v. *Int. Com. Comm.*, 206 U. S. 441, 445. The authorities upon this point are clear and

explicit and were reviewed by this court in *Tex. & Pacific Ry.* v. *Int. Com. Comm., supra.*

In the *Car Distribution case,* 215 U. S. 452, this court discussed at length the power of the Commission to determine what is unjust, undue, or unreasonable and to prescribe what will be just and reasonable for the future. In that case, this court, speaking through the present Chief Justice, said:

> In view of the facts found by the Commission as to preferences and discriminations * * * which must be taken as true, as the cause was submitted on bill and answer, *it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of section 3 of the act to regulate commerce prohibiting preferences and discriminations.*
>
> * * * *
>
> Conceding, for the sake of the argument, the existence of the preferences and discriminations charged, it is insisted, when the findings made by the Commission are taken into view and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, it is impossible, without *destroying freedom of contract,* to predicate illegal preferences or wrongful discriminations from the fact of purchase. But the proposition overlooks the fact that the regulation addresses itself not to the right to purchase but to the duty to make equal distribution of cars. The right to buy is one

> thing and *the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things. Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 475, 477. [Italics ours.]

In the *Coal cases*, recently decided, Mr. Justice Lamar, speaking for the court, said:

> Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the *permissible discrimination* based upon difference in conditions *are not matters of law.* So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196. [Italics ours.]

In the *Mitchell Coal case*, 230 U. S., 247, speaking of the scope and purport of the statute, Mr. Justice Lamar said:

> In one the legal quality of the practice complained of may not be definitely fixed by the statute so that an allowance, otherwise per-

> missible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid.
>
> * * * * *
>
> But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed * * *. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 255, 257.

In the *Shreveport case*, involving a discrimination caused by a difference between State and interstate rates, the court, speaking through Mr. Justice Hughes, said:

> The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under state authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission's power.
>
> * * * * *

> The Commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority and decided that it had the power to make this remedial order. * * * and it is clear that we should not reverse the decree unless the law has been misapplied. This we can not say; on the contrary, we are convinced that the authority of the Commission was adequate. *Houston E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342, 349, 359.

IV.

APPELLANT, BEING A PARTY TO THE RATES, WAS RESPONSIBLE, WITH THE OTHER DEFENDANT CARRIERS, FOR THE PREJUDICES AND DISADVANTAGES CONDEMNED.

1. It is stated in appellant's brief (page 23):

> It required the Reading to remedy a situation for which it was in no way responsible.

And (page 24):

> It is the other lines and not the Reading which have reduced the rate to 80 cents and thus created the situation complained of.
>
> How, then, by any possibility can a violation of law by the Reading be based on something which the Reading did not do, and over which it had no control?

Counsel point to the 80-cent rate from the other mills and assume that the Commission's order rests on a discrimination between the 80-cent rate, charged by other roads from other mills to Jersey City, and the $1.35 charged by the Philadelphia & Reading

and its connections for like traffic from Evansville. Some of the connecting carriers who are defendants in this order do join in the 80-cent rate from other mills to Jersey City. As the Philadelphia & Reading's rails used in this route extend only from Evansville to Allentown it may be true that it is not a party to any tariffs giving the 80-cent rate to Jersey City for domestic use. But it is error to say that the Commission rested its order upon the mere fact that there was this difference between the rates. As we have already stated, the Commission did not make a comparison of rates for the purpose of determining whether the difference between these rates, *considered alone*, created undue discrimination, but rested its order upon the fact that the appellant, with other carriers, *did* make a *relative adjustment of rates* from all mills upon all cement traffic in which the appellant participated to principal consuming points named in the report and order, and refused such an adjustment of rates to Jersey City.

2. Counsel, on page 15 of their brief, argue that the Reading is not bound and can not be compelled to meet competition from points not reached by its own rails. Counsel disregard the fact that the appellant is a party to joint rates from these competing points from all the mills to some, if not all, of the large consuming points. That as to all points, except Jersey City, it, with other carriers, maintains a relative adjustment of rates from all the mills in this district. Its rate to Jersey City is a joint rate. The establishment of joint rates is provided for in section 6 of the

act to regulate commerce. Such rates are made by agreement between the participating carriers and can not be filed or published without such agreement.

Section 6, among other things, provides:

> The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U. S. 536, 553, this court, speaking through Mr. Justice Peckham, said of the act to regulate commerce as then in force:

> It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The commerce act recognizes such right and provides for the filing with the Commission of the through tariff rates as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, *is one of agreement between the companies*, and they may or may not enter into it, as they may think their interests demand. [Italics ours.]

In *United States* v. *New York Central & H. R. R. Co.*, 212 U. S., 509, 515, this court, construing the pro-

visions of the Elkins Act in connection with section 6, speaking through Mr. Justice Day, held that—

> * * * the concluding part of section 1 of the Elkins Act, which we have above quoted, brings all of the carriers who have participated in any rate filed or published within the terms of the act, as much so as if the tariff had been actually published and filed by such participating carrier.

Suits and judgments for reparation for charging unreasonable joint rates run against all participating carriers.

The appellant, therefore, is just as responsible for the effect of joint rates in which it participates as it is for effects caused by individual rates. It is just as answerable for undue prejudice and advantage caused by joint rates to which it is a party as it would be if the rates were individual and not joint.

The appellant has no individual rate which covers the cement traffic from Evansville to Jersey City; the traffic moves on a joint rate. The cement traffic from other mills to Jersey City and to other principal consuming points also moves on joint rates. The Philadelphia & Reading is a party to many of these rates. It is also a party to the joint rate from Evansville to Jersey City. As a participating carrier in these rates it is responsible for the violation of the act described in the order. The order does not run against the Philadelphia & Reading alone; it runs against it and four other defendants, all of them participating carriers in the joint rate under consideration. What one carrier may not do individually it may not do with other carriers collectively.

If the Philadelphia & Reading served all the mills to all the points named, it certainly could not discriminate between the consuming points by giving a relative adjustment of rates on cement generally and refuse this adjustment to one locality. That undue preferences and advantages are occasioned by joint rates does not prevent the Commission from enforcing the provisions of the act against all the carriers participating in such unlawful joint rates. Section 15 expressly provides:

> That whenever, after full hearing * * * the Commission shall be of opinion that any individual *or joint rates* * * * collected by any common carrier *or carriers* subject to the provisions of this act * * * or that any * * * regulations or practices whatsoever * * * are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to * * * make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist. * * * [Italics ours.]

Section 3 of the act declares:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular * * * locality, * * * or to subject any particular * * * locality, * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

In the case at bar the Commission has found that the refusal to apply the relative adjustment of rates upon cement for domestic use to Jersey City as a consuming locality, while contemporaneously applying the relative adjustment to all other consuming points, was unduly prejudicial to Jersey City and was in violation of the provisions of the act. That this condition was produced by the joint action of the appellant and the other defendants named in the order in no wise affects the validity of the order.

CONCLUSION.

The Commission has found in its reports that the refusal of the Philadelphia & Reading Railway Co., in connection with participating carriers, to institute and maintain relative rates upon cement from Evansville, subjects Jersey City and its traffic to prejudices and disadvantages and that these prejudices and disadvantages are undue and unreasonable; and it has ordered the carriers responsible therefor to cease and desist therefrom. Under the authorities, it is clear that these conclusions become binding and obligatory upon the appellant and the other defendant carriers.

We respectfully submit that the decree of the district court should be affirmed.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel for Interstate Commerce Commission.

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MAP

TOO

LARGE

FOR

FILMING

6

No. 440.

October Term, 1915.

IN THE

SUPREME COURT OF THE UNITED STATES

PHILADELPHIA & READING RAILWAY COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, (INTERSTATE COMMERCE COMMISSION and ALLENTOWN PORTLAND CEMENT COMPANY, INTERVENING RESPONDENTS),

Appellees.

Brief for Allentown Portland Cement Company.

George W. Aubrey,
Chester N. Farr, Jr.,
Wm. A. Glasgow, Jr.,
Counsel for Appellee, Allentown Portland Cement Company, Intervenor.

Lawyers' Book Ptg. Co., 924 Walnut St., Phila.

IN THE

Supreme Court of the United States.

October Term, 1915. No. 440.

PHILADELPHIA & READING RAILWAY COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, (INTERSTATE COMMERCE COMMISSION and ALLENTOWN PORTLAND CEMENT COMPANY, Intervening Respondents),

Appellees.

BRIEF FOR ALLENTOWN PORTLAND CEMENT COMPANY.

The brief of learned counsel for Appellant sets up a proposition in this case as if it was the conclusion contained in the report of the Interstate Commerce Commission, and then seeks to demolish the same, and asks a reversal of the decree of the District Court.

Their "principal point" upon which they ask "this Court to reverse the decree of the District Court", is thus stated (Brief, p. 9):

> "All the rates charged by or participated in by an interstate carrier, being *per se* reasonable and non-discriminatory in their relation to one

another, no violation of the Act can be predicated on such carrier's refusal to adjust its rates to any given destination in accordance with sub-normal rates established by other independent carriers, in the fixing of which it has no voice."

This proposition as applied to this case is that the Philadelphia & Reading Railway Company should not be required, on shipments of cement from Evansville, Pa., to meet the rate of 80 cents per ton to Jersey City made by other carriers, from other points of shipment, simply because the Philadelphia & Reading Railway Company on shipments from Evansville to New York, Philadelphia, Baltimore and all other points east, makes rates to meet the rates of other carriers from other points to such eastern destinations.

This proposition is not involved in the present case, and the Commission in deciding the same was not required to reach such a conclusion. It entirely ignores the participation of the Philadelphia and Reading Railway Company in the system of joint rates from the Lehigh Group Rate District, on which cement is carried.

There is situate in the cement territory of Pennsylvania, what is known as the "Lehigh District", covering a radius of twenty miles, and numerous cement mills, including that of the Allentown Portland Cement Company, are located therein, all of which mills are in active competition.

The railroads serving this Lehigh District have all united in constituting the Lehigh District *one rate group* and applying to all the mills in the District the same respective joint rates to each destination point, whether the cement moves by one route or another, with the single exception, that while *to all points* east of Evansville, the Philadelphia & Reading Railway Company, over the routes to which it is a party, joins in making group rates to destination points, on ship-

ments from Evansville alone to the one destination, Jersey City, does the *Philadelphia & Reading* decline to recognize the rate group, and insists on charging on the cement of the Allentown Portland Cement Company, $1.35 per ton, a joint rate over the through routes to which it is a party, as against 80 cents per ton from every other mill in the Lehigh District, but the Philadelphia & Reading Railway Company joins in making a Group or District joint rate of 80 cents per ton from Evansville to Jersey City, when the cement is for transshipment by water to points in the Southeast, such as Charleston, Savannah, etc. (Record, p. 14).

The Philadelphia & Reading did not, before the order of the Commission, complained of, join in the rate of 80 cents to *Jersey City proper*, from any of the mills in the Group Rate District.

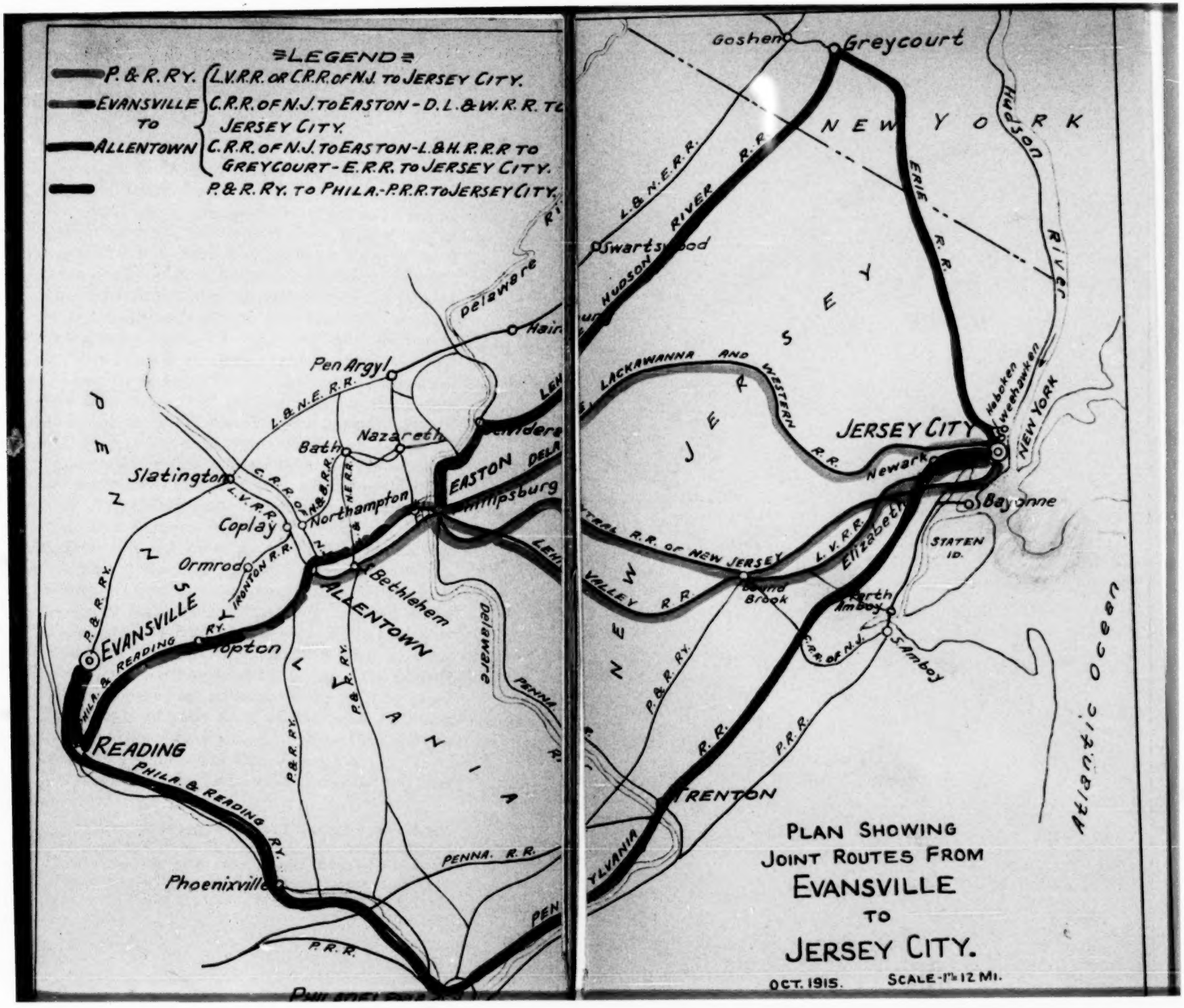
Evansville is located on the Philadelphia & Reading Railway alone, and the various routes over which cement may be shipped to Jersey City are as follows: Philadelphia & Reading to Allentown, and Central Railroad of New Jersey or Lehigh Valley to destination; Philadelphia & Reading to Allentown, Central Railroad of New Jersey to Phillipsburg and Delaware, Lackawanna & Western to destination; Philadelphia & Reading to Allentown, Central Railroad of New Jersey to Easton, Lehigh & New England (should be Lehigh & Hudson River) to Greycourt, and Erie Railroad to destination; Philadelphia & Reading to Philadelphia and Pennsylvania Railroad to destination. (Record, p. 14.)

The rate from every mill in the Lehigh District to Jersey City proper, is 80 cents per ton, except from that of the Allentown Portland Cement Company, and the Philadelphia & Reading Railway Company joins with the other roads serving the Lehigh District in establishing the same group rate from all of the mills in

that District to every other destination except Jersey City, and thus Jersey City is "singled out" by the Philadelphia & Reading Railway Company as the only point to which it will not join in establishing the District or Group rate (Record, p. 16).

Our proposition is that the Philadelphia & Reading Railway Company having joined with all of the carriers in establishing the Lehigh Rate District and a uniform system of rates applicable to all the mills in that District, and having singled out Jersey City as the only point to which it will not join in establishing the group rate, that thereby the Philadelphia & Reading Railway Company discriminates unjustly against Jersey City, as found by the Commission, and against the Allentown Portland Cement Company, with its plant at Evansville, in competition with other mills in the Lehigh District.

This is not a case of the Philadelphia & Reading Railway, having its own rails to Jersey City, declining to meet competitive rates of other roads from other points to Jersey City, but the situation is that all of the roads, including the Philadelphia & Reading, have joined in establishing the Lehigh Group Rate District, and in making a group rate from every mill in the District to every consuming point east of Evansville, except that the Philadelphia & Reading declines to join in making the group rate from Evansville to Jersey City on cement to be used there, although it does join in making the 80-cent group rate from Evansville to Jersey City, when the cement is to be trans-shipped beyond. We here present a map showing the Lehigh Group District and the railroads serving the same, and further showing the joint through routes to which the Philadelphia & Reading is a party, from Evansville to Jersey City.


LEGEND
P. & R. RY.
EVANSVILLE TO ALLENTOWN
L.V.R.R. OR C.R.R. OF N.J. TO JERSEY CITY.
C.R.R. OF N.J. TO EASTON - D.L. & W. R.R. TO JERSEY CITY.
C.R.R. OF N.J. TO EASTON - L. & H. R.R.R. TO GREYCOURT - E.R.R. TO JERSEY CITY.
P. & R. RY. TO PHILA. - P.R.R. TO JERSEY CITY.
Goshen
Greycourt
NEW YORK
Hudson River
L. & N.E.R.R.
Swartswood
HUDSON
ERIE R.R.
NEW JERSEY
LACKAWANNA AND WESTERN R.R.
Hoboken
Weehawken
NEW YORK
JERSEY CITY
Newark
Bayonne
Delaware
Pen Argyl
L. & N.E. R.R.
Bath
Nazareth
EASTON
DELA
Phillipsburg
Slatington
C.R.R. OF N.J.
L.V.R.R.
Coplay
Northampton
Ormrod
IRONTON R.R.
Bethlehem
ALLENTOWN
Delaware
EVANSVILLE
P. & R. RY.
PHILA. & READING RY.
Topton
P. & R. RY.
READING
PHILA. & READING RY.
PENNSYLVANIA
P. & R. RY.
PENNA. R.R.
Phoenixville
P.R.R.
PEN
Central R.R. of New Jersey
L.V.R.R.
Elizabeth
Staten Id.
Valley R.R.
Bound Brook
North Amboy
C.R.R. of N.J.
S. Amboy
P. & R. RY.
R.R.
P.R.R.
TRENTON
PENNSYLVANIA
Atlantic Ocean
PLAN SHOWING
JOINT ROUTES FROM
EVANSVILLE
TO
JERSEY CITY.
OCT. 1915.
SCALE - 1" = 12 MI.

By this refusal of the Philadelphia & Reading to join in the through route and joint rate of 80 cents to Jersey City proper, the Allentown Portland Cement Company "is effectively barred from competition in that part of" New York City "located south of 43rd Street, which is the greatest cement consuming district. North of 90th Street" the Allentown Portland Cement Company "can compete with the other mills because of their greater expense in the longer truck haul from Jersey City. It will also necessarily be apparent that" the Allentown Portland Cement Company "cannot sell any cement in Jersey City for local consumption in competition with these other mills which have the 80-cent rate." (See report of Commission, Record, p. 15.)

The result of this is that while the Philadelphia & Reading Railway Company joins with all of the other carriers in establishing the Lehigh Cement District as a Group Rate District, and applying from each of the mills therein equal rates to destination points, the Philadelphia & Reading declines to give to the Allentown Portland Cement Company from *Evansville alone* in the Group Rate District, the group rate which the other carriers give from all the other mills to Jersey City, and the Philadelphia & Reading joins with the other carriers in establishing the Group Rate District and publishing the joint rates necessary to bring about this uniformity of rates from all the mills, including that of the Allentown Portland Cement Company, to all destination points other than Jersey City.

On this subject the Commission says (Report, Record, p. 16):

> "While it is true that the Philadelphia & Reading does not have any hand in the establishment of the 80-cent rate from these other mills, as it cannot participate in that traffic because it does not serve them, it is also true that it is a party to

tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh District by dealers in and consumers of cement at practically all points of importance east of that District, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same District, has not been satisfactorily shown by this Record. We are therefore of opinion, and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh District, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist."

If the Philadelphia & Reading had its own line to Jersey City, and did not join with the other carriers in establishing the Group Rate District, in which all the cement mills are located, and if it did not join in making this uniform group rate to "practically all points of importance east of that District", then the contention might be made, which is now put forward by counsel for appellant, that the Philadelphia & Reading could not be required to meet the rates of other carriers from other mills to Jersey City, if it did not desire to participate in the traffic.

But the situation is entirely different, in view of the finding of the Commission as to the Philadelphia & Reading Railway Company joining in the establishing of the Lehigh Group Rate District, and when it does so

join in establishing such Group Rate District and the "equalization of rates as between competing mills in the same", we submit that the Commission was right in its conclusion that when the Philadelphia & Reading Railway Company "singled out" the Allentown Portland Cement Company and Evansville as "the one exception to this equalization of rates as between competing mills in the same District", that thereby the Philadelphia & Reading Railway Company unjustly discriminated against Jersey City in not permitting it to buy its cement on equal terms from any mill in the Group Rate District, (a right which all the other localities had), and also discriminated against the Allentown Portland Cement Company in not permitting it to have the advantage of "the equalization of rates" as between it and mills competing with it for the sale of cement in Jersey City.

We submit that the Philadelphia & Reading cannot properly join with all the other carriers in establishing a Group Rate District, and then single out one cement mill, which it alone serves and decline to join in giving that mill the benefit of its location in such Group Rate District, and thereby exclude that mill from the most important nearby market.

The Allentown Portland Cement Company in its petition before the Commission, complained that the Philadelphia & Reading Railway Company and others discriminated against it as to shipments of cement to Jersey City. In its report, the Commission held that the carriers, defendants, discriminated against Jersey City, and the Bill in this case in the District Court attacked the order of the Commission on the ground that the Commission's order should not be sustained in finding that there was discrimination against Jersey City, when the complaint was filed charging discrimination

against the Allentown Portland Cement Company, located at Evansville.

As stated in the brief of learned counsel for appellant, this was "a question of pleading or procedure", and at page 8 of their brief, they say:

> "In other words, we do not here contend that this court should reverse the decree of the District Court and annul the order of the Commission merely because the Commission's order was in favor of Jersey City, while the complaint came from Evansville, but that this circumstance is significant in considering the soundness of the Commission's ruling on the real question in the case."

As it would appear that learned counsel do not contend that the decree of the District Court should be reversed on this ground, and as it seems clear from the Act to Regulate Commerce that the Commission had power to order the defendants to cease and desist from any discrimination which might be shown to exist, we will not further discuss this question.

We submit that the decree of the District Court should be affirmed.

GEORGE W. AUBREY,
CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Appellee, Allentown Portland Cement Company, Intervenor.

PHILADELPHIA AND READING RAILWAY COMPANY *v.* UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, AND ALLENTOWN PORTLAND CEMENT COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 440. Argued October 18, 19, 1915.—Decided February 28, 1916.

Where, as in this case, no undue discrimination against the shipper or the locality of its plant is found, and the community declared to be prejudiced by the established conditions has not complained and is not a party to the proceeding, and the rate complained of is intrinsically reasonable, the mere fact that other carriers have adopted a lower schedule from the shipper's district to points other than the one designated, affords no foundation for a finding by the Interstate Commerce Commission that such rate is unreasonable and erroneous as matter of law.

As the order of the Commission in this case is not supported by the ascertained facts its enforcement should be enjoined.

219 Fed. Rep. 988, reversed.

THE facts, which involve the validity of an order of the Interstate Commerce Commission relating to railway rates, are stated in the opinion.

Mr. Henry S. Drinker, Jr., for appellant.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. William A. Glasgow, Jr., for respondent Allentown Cement Company.

Mr. Assistant Attorney General Underwood and *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, for the United States submitted:

The practice complained of subjected Jersey City to undue and unreasonable prejudice and disadvantage. Section 3 of the Act to Regulate Commerce forbids discrimination of any kind whatsoever. *Houston & Tex. Ry.* v. *United States*, 234 U. S. 342, 356; *Southern Ry.* v. *United States*, 204 Fed. Rep. 465; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 118 Fed. Rep. 613.

It is within the power of the Commission to protect the consuming point from discrimination as well as the locality where the traffic originates. *Tex. & Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184, 220.

What is undue or unreasonable preference or advantage is a question not of law but of fact. *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Tex. & Pac. Ry.* v. *United States*, 162 U. S. 197, 219; *Int. Com. Comm.* v. *Alabama Midland Ry.*, 168 U. S. 144, 170.

The determination of this question of fact is for the Commission, and its findings are conclusive. *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320.

This case having been submitted on bill and answer, the preferences and discrimination alleged in the answer of the Commission must be taken as true. *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 475; *Int. Com. Comm.* v. *Chi. & Alton R. R.*, 215 U. S. 479; *Int. Com. Comm.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88.

Appellant having voluntarily, in its traffic agreements with the other carriers, established the same relative rates from all points in the Lehigh district to consuming points other than Jersey City, cannot, if conditions are the same, arbitrarily decline to make the same arrangement with respect to Jersey City. *Phila. & Reading Ry.* v. *United States*, 219 Fed. Rep. 988; *Darling* v. *Balt. & Ohio R. R.*, 15 I. C. C. 79, 87; *Spokane* v. *Nor. Pac. Ry.*, 21 I. C. C. 400, 424.

The Commission, after consideration of evidence, not set out in the record but adduced at the hearing before

it, found, it must be presumed, that conditions existing at Jersey City were not so different from those existing at other consuming points as to justify different treatment. There is nothing in the record to show the absence of substantial evidence supporting these findings of fact, so they are "conclusively correct in case of judicial review." *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This appeal brings up a final decree of the United States District Court, Eastern District of Pennsylvania, which dismissed the railway's original bill presented to secure annulment of an order by the Interstate Commerce Commission commanding it and other carriers to desist from subjecting Jersey City to undue prejudice and disadvantage in respect of rates on Portland cement from the "Lehigh District" in Pennsylvania. 219 Fed. Rep. 988.

Appellant maintains that when considered in connection with its report, the Commission's order is plainly erroneous as matter of law because wholly unsupported by the ascertained facts. *Interstate Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91; *Florida East Coast Line* v. *United States*, 234 U. S. 167, 185.

In November, 1912, the Allentown Portland Cement Company filed a petition before the Interstate Commerce Commission against the Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and Pennsylvania Railroad Company, wherein it alleged the Philadelphia & Reading operates the only line reaching its plant at Evansville, Pa., and in connection with other defendants transports cement therefrom to many points, including Jersey City;

that the published rate of $1.35 per ton charged and collected for transportation to the latter place is unlawful and forbidden by §§ 1 and 3 of the Act to Regulate Commerce. It prayed for "an order declaring the rates aforesaid to be unjust and unreasonable and that the same discriminate against complainant and the locality wherein is located its plant or factory aforesaid, and that the Commission will also enter an order fixing the reasonable and just rates for the transportation of Portland Cement from its factory or plant at Evansville, over the lines of the defendants." After hearing, a report and order were made by the Commission; upon rehearing the original findings were approved in an additional report and a supplemental order, not substantially different from the first one, was passed. The material portions of these reports follow:

"The case involves the question of the reasonableness and justness of defendants' rate for the transportation of cement in carloads from Evansville, Pa., to Jersey City, N. J. Evansville is reached only by the Philadelphia & Reading Railway. That carrier transports the cement in question from Evansville to Allentown, where it delivers it to one of numerous connections which either transports it to Jersey City or in turn delivers it to other carriers for final delivery at Jersey City. The rate via these various routes is $1.35. Certain of the carriers which receive this Evansville cement from the Philadelphia & Reading at Allentown also serve other mills in the same general vicinity as Allentown, namely, the Lehigh district, either directly or through connections. The rate from these other mills to Jersey City is 80 cents. The Philadelphia & Reading does not participate in the 80-cent rate from any mill in the district." 31 I. C. C. 277.

"Evansville is situated in the Lehigh district and is one of numerous cement mills in that district located within a radius of perhaps 20 miles of each other. None of the other mills, however, are reached by the Philadel-

phia & Reading, they being served by the Central Railroad of New Jersey or Lehigh Valley direct or by short lines of railway which connect with those carriers at distances of from 1 to 16 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading the rate to Jersey City from these competing mills on other lines is 80 cents. . . . On shipments to Jersey City for trans-shipment by water to points in the southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills; and this equality of Evansville with the other mills is maintained on traffic to Philadelphia, Baltimore, New York City, and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

"The 80-cent rate to Jersey City locally from the other mills is used in connection with shipments destined to New York, that rate plus the trucking charge to all points south of Ninetieth street totaling less than the $1.40 rate to New York proper plus the trucking charge to the same point, the result being that complainant, who must use the latter rate, is effectively barred from competition in that part of the city located south of Forty-third street, which is the greatest cement consuming district. North of Ninetieth street complainant can compete with the other mills because of their greater expense in the longer truck haul from Jersey City. It will also necessarily be apparent that complainant can not sell any cement in Jersey City for local consumption in competition with these other mills which have the 80-cent rate."

"It can not be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the

establishment of the 80-cent rate from these other mills, as it can not participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of opinion, and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist." 27 I. C. C. 448.

Purporting to base its action on the foregoing findings, the Commission directed:

"That the above-named defendants, according as their various lines or routes may run, be, and they are hereby, notified and required, on or before October 1, 1914, to cease and desist from said undue and unreasonable prejudices and disadvantages."

"That said defendants, according as their various lines or routes may run, be, and they are hereby notified and required to establish on or before October 1, 1914, upon statutory notice to the Interstate Commerce Commission and to the general public by filing and posting in the man-

ner prescribed in section 6 of the act to regulate commerce, and for a period of two years after said October 1, 1914, to maintain and apply to said transportation rates which will prevent and avoid the aforesaid undue and unreasonable prejudices and disadvantages."

Undue discrimination against itself or the locality of its plant, as alleged by the cement company, was not found; the community declared to be prejudiced by established conditions had offered no complaint and was not party to the proceedings. Neither the $1.35 rate to Jersey City nor any other participated in by the Philadelphia & Reading was declared unreasonable, either in itself or in relation to others; and there was no positive finding touching the reasonableness—intrinsic or relative—of the 80-cent schedule from "Lehigh District" adopted by the remaining carriers.

In their brief here, counsel for the Commission say:

"The Commission did not pass upon the reasonableness of either rate [to Jersey City—80 cents or $1.35]. It struck at the discrimination and the cause of it. It said, in effect, to these five carriers that as they treated the Lehigh cement district as one point of origin and made a *relative adjustment of rates* on cement to all the principal consuming points competing with Jersey City, they must make the same adjustment of the rates to Jersey City on this commodity; that they might make the rate any sum which they might choose to initiate, but that it must be the same as the rate from every mill in the district to Jersey City. . . ."

"If, as to all other consuming localities, they [the carriers] are giving the relative adjustment of rates on cement from cement mills in the Lehigh district, and refusing this adjustment to one consuming locality, they are prejudicing that locality. . . ."

"The establishment of joint rates is provided for in section 6 of the act to regulate commerce. Such rates

are made by agreement between the participating carriers and cannot be filed or published without such agreement. . . ."

"The appellant has no individual rate which covers the cement traffic from Evansville to Jersey City; the traffic moves on a joint rate. The cement traffic from other mills to Jersey City and to other principal consuming points also moves on joint rates. The Philadelphia & Reading is a party to many of these rates. It is also a party to the joint rate from Evansville to Jersey City. As a participating carrier in these rates it is responsible for the violation of the act described in the order."

We must assume the Jersey City rate of $1.35 is intrinsically reasonable and non-discriminatory in relation to those accorded other consuming points; and, plainly, if this were put in by all carriers, the Commission's order would be complied with and the supposed discrimination disappear. It must be taken as true that no rate above what all might lawfully establish is being demanded by any carrier; and, with one exception, they are paid forty per cent. less than that amount. If a universal rate of $1.35 could not justly be complained of by the locality, certainly *it* is not discriminated against or unlawfully prejudiced because, failing to agree, most of the carriers have established an 80-cent schedule. In the circumstances disclosed it is impossible rightly to conclude that Jersey City is being subjected to "any undue or unreasonable prejudice or disadvantage."

As the facts reported afford no foundation for the Commission's findings, enforcement of the order based thereon must be enjoined. The decree below is accordingly reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed.